Supreme Court, U.S.
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No. 98 ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EDWARD J. SHOEN,
Petitioner,

v.

SAMUEL W. SHOEN, CECILIA M. SHOEN-HANLON, THERESA SHOEN-ROMERO, KATRINA M. SHOEN-CARLSON, MICHAEL L. SHOEN, LEONARD S. SHOEN, SAMWILL, INC., CEMAR, INC., KATTYDID, INC., THERMAR, INC., MICKL, INC., AND L.S.S., INC.,
Respondents.

Petition for a Writ of Certiorari to the Arizona Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the imposition of punitive damages solely on an individual member of a board of directors for collective actions taken by the board as a whole violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

II. Does the imposition of punitive damages based solely on a defendant's "state of mind" without relation to any unlawful conduct by the defendant violate the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioner Edward J. ("Joe") Shoen was petitioner/cross-respondent before the Arizona Supreme Court, appellant/cross-appellee before the Arizona Court of Appeals, and defendant before the Maricopa County Superior Court.

Respondents Samuel W. Shoen, Cecilia M. Shoen-Hanson, Theresa Shoen-Romero, Katrina M. Shoen-Carlson, Michael L. Shoen, Leonard S. Shoen, Samwill, Inc., Cemar, Inc., Kattydid, Inc., Thermar, Inc., Mickl, Inc., and L.S.S., Inc., were respondents/cross-petitioners before the Arizona Supreme Court, appellees/cross-appellants before the Arizona Court of Appeals, and plaintiffs before the Maricopa County Superior Court.

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PETITION FOR A WRIT OF CERTIORARI

Edward J. ("Joe") Shoen petitions for a writ of certiorari to review the judgment and opinion of the Arizona Court of Appeals entered in the above-captioned case on July 24, 1997.

OPINIONS BELOW

The order of the Arizona Supreme Court denying review is not reported and is reprinted in the appendix hereto ("App.") at 24a. The opinion of the Arizona Court of Appeals is not reported and is reprinted at App. 1a. The ruling of the Maricopa County Superior Court is

not reported and is reprinted at App. 65a. The opinion of the Arizona Court of Appeals affirming the denial of a preliminary injunction is reported at 167 Ariz. 58, 804 P.2d 787 and is reprinted at App. 38a. The opinion of the Maricopa County Superior Court denying injunctive relief is not reported and is reprinted at App. 25a.

JURISDICTION

The judgment of the Arizona Court of Appeals was entered on July 24, 1997. The Arizona Supreme Court issued its order denying petitioner's timely petition for review on March 17, 1998. App. 24a. On June 3, 1998, Justice O'Connor granted petitioner's application to extend the time for filing this petition to and including July 15, 1998. App. 75a. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction. The underlying dispute in this case concerned the corporate control of AMERCO, the parent company of U-Haul International, Inc. Petitioner Joe Shoen was the President and Chairman of the six-member AMERCO board of directors when actions taken collectively by the AMERCO board precipitated this litigation by certain AMERCO shareholders—respondents here. After a seven-week jury trial, petitioner, along with the other members of the AMERCO board, was found liable for $1.47 billion in compensatory damages for breach of

fiduciary duty, based on actions that were taken pursuant to the board's unanimous and collective approval. In addition, Joe Shoen alone was found liable for $70 million in punitive damages. After plaintiffs accepted a remittitur ordered by the trial court, these amounts were reduced to $461 million in compensatory damages against all defendants jointly and severally, and $7 million in punitive damages against Joe Shoen alone.

The punitive damages award came after the trial court granted a directed verdict as to punitive damages in favor of all defendants except Joe Shoen, despite the fact that the only conduct supporting liability was collective board action taken on the unanimous vote of all members of the board. The courts below allowed Joe Shoen to be singled out for punitive damages based on his alleged state of mind, which the courts found evidenced not by any unlawful conduct, or indeed by any conduct that was directly related to the board vote which gave rise to the award of compensatory damages, but rather by Joe's tumultuous relationship with his father and one of his siblings. In other words, Joe Shoen, alone among the directors, was found liable for $7 million in punitive damages based on conduct that, standing alone, was not unlawful and which itself caused respondents no injury. The award of punitive damages against petitioner in these circumstances violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and conflicts with this Court's cases.

Facts. In 1988, 97 percent of the stock of AMERCO was owned in roughly equal shares by thirteen different members of the Shoen family—Leonard Samuel ("L.S.") Shoen and his twelve children. App. 2a. The members of the Shoen family could not agree on how AMERCO should be managed, and by the summer of 1988 two factions had developed among the family members. One group of the family—which controlled slightly less than

46 percent of the outstanding shares of the company and included petitioner and his siblings Paul Shoen, James Shoen, Mark Shoen, and Sophia Shoen—was generally not in favor of selling the company. App. 39a. When the pertinent events in this case took place, Paul Shoen and James Shoen, along with Joe Shoen, were also members of AMERCO's six-member board of directors. App. 7a. The other faction of the family, including L.S. Shoen, Sam Shoen, Cecilia Shoen-Hanson, Theresa Shoen-Romero, Katrina Shoen-Carlson, and Michael Shoen—respondents here—wanted to "maximize the liquidity * * * of their stock," *i.e.*, sell the company, and entered into a voting trust agreement to attempt to realize that goal. App. 5a.[1] When the voting trust was established, this faction controlled 49.66 percent of the outstanding shares of AMERCO. *Id.* None of the members of this group were members of the AMERCO board during the summer of 1988.

The conduct on which liability was based occurred during July 1988. App. 10a n.7. Over the weekend of July 22-24, 1988, respondents went to New York to meet with investment bankers and receive advice about selling the company. Joe Shoen learned of respondents' trip and called a special meeting of the board of directors for July 24. App. 6a. Prior to the meeting, Joe and his siblings Paul, James, Mark, and Sophia entered into a lawful voting trust agreement by which the shares of all five members would be voted as a block as directed by a majority of the five members, and would be voted against any corporate sale or merger not approved by all five members. James Shoen—not petitioner—was to act as the proxy to vote the shares if there were any disagreement as to the majority's wishes. App. 7a.

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[1] Mary Anna Shoen-Eaton was also part of this faction and she and her corporation, Maran, Inc., were plaintiffs below. They settled with petitioner as to punitive damages, however, and are not respondents here.

At the July 24, 1988 board of directors meeting and at a board meeting held the next day, the board voted unanimously to take a number of actions that would make it more difficult for the respondents to gain control of AMERCO and thereby sell the company. These actions were taken by the six-member board without any members dissenting, and were all taken on the advice of counsel. App. 41a-42a. Among the actions taken by the board was the issuance of certain previously-authorized AMERCO voting stock to key employees.[2] The employees gave the authority to vote these shares to the board, which in turn gave this authority to petitioner. *Id.*

Respondents (none of whom were board members) were not immediately informed of the board's actions. On July 27, 1988, respondents obtained the agreement of the trustee who voted the shares held in trust for minor Shoen siblings to vote with them. App. 44a. That action would have given the respondents control of more than 50 percent of the stock that was outstanding before the board of directors' actions on July 24 and 25, 1988. Upon delivering to AMERCO's secretary the signed shareholders' consents evidencing their voting trust on July 28, 1988, respondents were informed that they had failed to obtain control due to the additional shares that had been issued by the board on July 24, 1988. App. 7a.

Proceedings Below. Shortly thereafter, respondents sued petitioner and the other members of AMERCO's board of directors, alleging that the conduct by the board in July 1988 constituted a breach of fiduciary duty which prevented respondents from securing majority control of the company. Respondents sought a preliminary injunction

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[2] Issuance of these shares was a means of compensating and promoting the loyalty of valued employees. App. 46a. Joe Shoen loaned funds to these employees to enable them to place the down payment required to purchase the newly-issued AMERCO stock. App. 7a.

that would have canceled the July 1988 issuance of AMERCO voting stock to key employees. The trial court denied the request for a preliminary injunction, App. 25a, and the Arizona Court of Appeals affirmed, on the basis, *inter alia*, that respondents had failed to show a likelihood of success on the merits. App. 63a.

The case returned to the trial court for trial of respondents' claims for compensatory and punitive damages. Of the two claims that were tried to the jury, only one could possibly provide a basis for punitive damages—respondents' claim that the actions taken by the board of directors in July 1988 constituted a breach of the board's fiduciary duty by entrenching the power of incumbent management.[3] In the course of the seven-week jury trial, the trial court granted a motion for directed verdict on the issue of punitive damages in favor of all defendants except Joe Shoen. App. 67a. The trial court concluded that Joe Shoen could be liable for punitive damages individually, even though the only conduct challenged by the plaintiffs as violating the board's fiduciary duty was the collective action of the board taken pursuant to unanimous votes by all the directors. The court singled Joe Shoen out for the imposition of punitive damages—even though his conduct was indistinguishable from that of the directors granted immunity from punitive damages—because of Joe Shoen's alleged state of mind. In doing so, the court relied on evidence showing general animosity between Joe Shoen and his father and siblings—animosity unrelated to the vote on which liability for compensatory damages was based, or the circumstances surrounding that vote—including "a history of strong feelings, negative feelings * * * between [Joe Shoen and] his father, L.S. Shoen * * * and between [Joe Shoen and] Samuel Shoen." App. 72a.

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[3] Respondents also pursued a breach of contract claim that, under applicable state law, could not provide a basis for punitive damages. *See S.J. Amoroso Constr. Co.* v. *Lazovich & Lazovich*, 810 P.2d 775, 777 (Nev. 1991); *Sprouse* v. *Wentz*, 781 P.2d 1136, 1140 (Nev. 1989).

The jury returned a verdict of $1.47 billion in compensatory damages against all defendants, and $70 million in punitive damages against Joe Shoen. The trial court granted the defendants' motion for remittitur and reduced the award of compensatory damages to $461 million, to be paid to the plaintiffs in exchange for their AMERCO stock. The trial court further found the punitive damages award against Joe Shoen to be excessive and ordered that it be remitted to $7 million. App. 2a.

Joe Shoen filed a timely appeal to the Arizona Court of Appeals, limited to the issue of punitive damages.[4] Petitioner argued, among other things, that singling him out from the other members of the board of directors for an award of punitive damages violated the principle that punitive damages must be limited to instances of " 'punishing unlawful conduct and deterring its repetition.' " Appellant's Combined Answering Brief on Cross-Appeal and Reply Brief on Appeal at 23, *Shoen* v. *Shoen* (Ariz. Ct. App. No. 1 CA-CV 95-0199) (Feb. 12, 1997) (quoting *BMW of North America, Inc.* v. *Gore*, 116 S. Ct. 1589, 1595 (1996)).

The Arizona Court of Appeals affirmed the judgment of punitive damages on the basis that the evidence supported the trial court's conclusion that "except for Joe, there was no evidence that the defendants acted with malice, while there *was* evidence to support a finding that Joe did." App. 11a (emphasis in original). The evidence relied on by the court of appeals to establish malice, like that relied on by the trial court, was not directly connected to the unlawful conduct on which the compensatory damages were based, or to the circumstances surrounding that conduct. Instead, the court of appeals justified the award of

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[4] Respondents cross-appealed the remittitur by the trial court of the award of punitive damages but did not challenge the remittitur of the compensatory damages award or the directed verdict on punitive damages entered on behalf of all the defendants except petitioner.

punitive damages based primarily on (1) a letter Joe Shoen wrote to his father *more than six years before* the July 1988 vote of the board expressing "resentment toward his father and siblings," (2) a "bitter" statement about an unrelated matter that Joe Shoen made to a third person almost a year *after* the conduct on which liability was based, and (3) a "history of strong feelings, negative feelings" the court concluded Joe had for his father and one of his brothers. App. 13a-15a. None of this conduct or alleged mental attitude was in any way unlawful but instead centered on the historically troubled relationship between Joe Shoen and two of the respondents—his father and one of his brothers.

Joe Shoen filed a timely petition for review with the Arizona Supreme Court arguing, *inter alia*, that the $7 million in punitive damages awarded against him violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Pet. for Rev. at 3, 12-13 (Aug. 25, 1997). The Arizona Supreme Court denied review on March 17, 1998. App. 24a. On June 3, 1998, Justice O'Connor entered an order extending the time within which to file this petition to and including July 15, 1998. App. 75a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN TENSION WITH THIS COURT'S PRECEDENTS, REFLECTS INSUFFICIENT AWARENESS OF THE CONSTITUTIONAL CONSTRAINTS ON PUNTIVE DAMAGES AWARDS, AND PROVIDES AN APPROPRIATE OPPORTUNITY TO FURTHER CLARIFY THE DUE PROCESS AND EQUAL PROTECTION LIMITATIONS ON SUCH AWARDS

"[T]ime and again, this Court and its Members have expressed concern about punitive damages awards run wild, inexplicable on any basis but caprice or passion." *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 475 (1993) (O'Connor, J., dissenting) (internal quotations and citations omitted). This case presents the Court with the question whether the "acute danger of arbitrary deprivation of property" in violation of the Due Process Clause that can readily arise in connection with punitive damages is realized when a jury is invited to award such damages against a single member of a board of directors for a collective action by the entire board, based on nothing more than the defendant's "state of mind" without relation to any unlawful conduct. *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994). This case further presents the Court with the opportunity to examine the limits placed on punitive damages by the Equal Protection Clause in a particularly stark context: specifically, whether equal protection of the laws is denied when one member of a board of directors—whose conduct is sanctionable only because it is part of a collective action taken by all members of the board—is arbitrarily singled out for an award of punitive damages, even though his conduct is indistinguishable from that of every other member of the board.

In the absence of identical conduct by the other members of the board, the only *conduct* by Joe Shoen that could form the basis of an award of $7 million in punitive

damages—his single vote as one of six board members—violated no law and caused no harm. The conduct found unlawful here was a unanimous vote of AMERCO's board of directors, including Joe Shoen, in favor of proposals that the jury concluded violated the board's fiduciary duty to the plaintiffs.[5] Joe Shoen's vote was neither necessary nor sufficient for the board to take the actions that formed the basis of the plaintiffs' claim. Indeed, if Joe Shoen had voted against the rest of the members of the board of directors, the outcome to the plaintiffs would have been exactly the same. Nor was Joe Shoen found to be the driving force behind the board's vote, or to have exercised overbearing influence on the other members of the board.

Nonetheless, of all the directors, each of whom voted to take the same actions with regard to the corporation, the courts below concluded that Joe Shoen could be singled out because the evidence showed that only he could have acted "with the requisite state of mind." App. 11a. The evidence on which the courts relied to prove this state of mind, however, was wholly unrelated to the board vote on which liability for compensatory damages was based. Holding that Joe Shoen could be liable for punitive damages based solely on his state of mind thus provided the jury with discretion to award $7 million in punitive damages against him based only on its assessment of a discordant relationship between him and other members of the Shoen family. In addition, because Joe Shoen's conduct by itself could not form the basis for any award of compensatory damages, the $7 million in punitive damages is an infinite multiple of the amount of compensatory damages that could be assessed based on Joe Shoen's conduct standing alone. This case thus provides the Court with

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[5] For this breach of fiduciary duty, all members of the board of directors were found jointly and severally liable and were required, after remittitur, to pay over $461 million in exchange for plaintiffs' AMERCO stock. As noted, the award of compensatory damages was not appealed by defendants, nor was its remittitur appealed by the plaintiffs. App. 8a-9a.

the opportunity to address whether an award of punitive damages that is the product of such unfocused discretion violates the Due Process Clause, as well as whether such an arbitrary differentiation between Joe Shoen and the remaining directors—whose conduct was indistinguishable —violates the Equal Protection Clause.

A. The Award of Punitive Damages Is Inconsistent With This Court's Precedents Under the Due Process Clause

This Court's recent decisions concerning the limits placed on awards of punitive damages have primarily concerned whether the amount of a punitive damages award may be so excessive as to violate the Due Process Clause. *See BMW of North America* v. *Gore*, 116 S. Ct. 1589 (1996); *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991). These cases also have addressed, however, additional limits due process imposes on punitive damages. Thus, in *Pacific Mutual Life Insurance Co.* v. *Haslip*, this Court upheld a punitive damages award against a due process challenge only after assuring itself that the jury's "discretion [was] exercised within reasonable constraints." 499 U.S. at 20. Similarly, in *BMW of North America, Inc.* v. *Gore*, Justice Breyer noted that "[l]egal standards need not be precise in order to satisfy [due process]. But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior." 116 S. Ct. at 1605 (Breyer, J., concurring). In other words, the Due Process Clause requires that the discretion of the jury—and the court—be properly constrained and directed to avoid arbitrary awards of punitive damages. *See Haslip*, 499 U.S. at 18 (expressing concern about "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages").

This case provides the Court with the opportunity to determine whether such constitutionally required con-

straints are lacking when a court determines as a matter of law that only one of a group of defendants liable for a collective action may be singled out for jury consideration of punitive damages, based solely on evidence of that individual defendant's general "state of mind," totally disassociated from any unlawful conduct. By severing the connection between the conduct supporting compensatory damages and the award of punitive damages, the court below failed to limit adequately the jury's discretion. It in effect allowed the jury to punish one man for the actions of a group, actions the individual could not have taken alone. The court compounded its error by allowing the jury to base its punitive damages award on general "state of mind" evidence not connected in any meaningful way to the actions that formed the basis of liability, permitting the jury to pass judgment on subjective issues of familial relations through the award of punitive damages. By granting a directed verdict on the issue of punitive damages to all the director defendants except Joe Shoen, the court below gave "free reign to the biases and prejudices of individual jurors," allowing them "to target [an] unpopular defendant[] and punish [him] selectively" for a collective action of the board. *Haslip*, 499 U.S. at 63 (O'Connor, J., dissenting).

One of the ways in which juror discretion in the award of punitive damages has been cabined is by requiring a connection between compensatory and punitive damages. Indeed, punitive damages could not be awarded here in the absence of compensatory damages,[6] and this Court has insisted on review of punitive damages awards to ensure some proportional relationship between the two. *BMW*, 116 S. Ct. at 1601; *TXO*, 509 U.S. at 459; *Haslip*, 499 U.S. at 23. Here the act that allowed the plaintiffs to

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[6] Under applicable Nevada law, punitive damages may not be awarded in the absence of compensatory damages. *See S.J. Amoroso Constr. Co.* v. *Lazovich & Lazovich*, 810 P.2d at 777; *City of Reno* v. *Silver State Flying Serv., Inc.*, 438 P.2d 257, 264 (Nev. 1968) (citing cases).

recover compensatory damages was the act of the *board*, but the state of mind that allowed them to recover punitive damages was that of an *individual*. This severing of the link between compensatory and punitive damages correspondingly expands the discretion of the jury, and nullifies one of the important constraints on that discretion. This case accordingly provides the Court with the opportunity to determine whether an award of punitive damages may stand where no compensatory damages could be imposed. *See generally Shippen* v. *Parrott*, 553 N.W.2d 503, 511 n.6 (S.D. 1996) ("punitive damages may not be imposed to 'punish' or to 'deter' non-actionable conduct") (citing *BMW*, 116 S. Ct. at 1598).

Three related aspects of the punitive damages award here evidence the lack of a connection between the award of punitive damages and that of compensatory damages, confirming that the punitive damages award against Joe Shoen lacked that essential constraint on the exercise of discretion by the jury. First, the lack of causation exhibits the lack of a connection—because the only conduct of Joe Shoen for which liability was imposed did not *by itself* cause any harm to respondents, the punitive damages award against him alone has no relationship to conduct that could, on its own terms, form the basis for compensatory damages. Second, the lack of proportionality exhibits the absence of a connection—because Joe Shoen's conduct by itself caused respondents no damages, the punitive damages award here is an infinite multiple of the amount of compensatory damages that could have been entered against Joe Shoen alone. Third, the disassociation between Joe Shoen's purported mental state and his sanctionable conduct exhibits the lack of a connection—because the evidence of his supposed mental state, reflecting an historically troubled family relationship, was not connected to his vote as one member of the board. Accordingly, the punitive damages award here violates the Due Process Clause because it is not adequately linked to the conduct that supported the award of compensatory damages, and

thus resulted from an exercise of discretion by the jury that had no meaningful constraints.

If the restraints placed by the Due Process Clause on the award of punitive damages are to have any meaning, they must at the least require that the conduct that forms the basis of liability for punitive damages be the legal cause of injury to the plaintiff. Here there is no such link because Joe Shoen's conduct—the casting of one among six votes of board members—did not by itself cause any damage to respondents.[7] The unlawful conduct supporting the compensatory award was a collective, unanimous action by the entire board of directors.

The court of appeals justified its punitive damages judgment against Joe Shoen on the basis that a majority of courts have held that joint tort-feasors may be held liable individually for punitive damages. App. 11a-12a. This rule applies where different defendants have taken different unlawful actions that result in a finding of liability. *See, e.g., Huckeby* v. *Spangler*, 563 S.W.2d 555, 560 (Tenn. 1978) (compensatory damages awarded against group of defendants for operating house of illegal gambling—punitive damages justified only against the defendant who fired a shot that injured the plaintiff). This rule, however, does not justify finding one director but not others liable for punitive damages based on identical

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[7] Allowing an award of punitive damages solely against Joe Shoen contradicts the well-established rule of corporate law that "where two or more directors participate in * * * wrongful acts" liability is joint and several. 3 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1002 at 719 (1994 ed.) (footnote omitted); *see, e.g., Radol* v. *Thomas*, 772 F.2d 244, 259 (6th Cir. 1985) ("[t]he law is clear that directors and officers of a corporation are jointly and severally liable if they jointly participate in a breach of fiduciary duty"), *cert. denied*, 477 U.S. 903 (1986); *Smith* v. *Van Gorkom*, 488 A.2d 858, 889 (Del. 1985) ("since all of the defendant directors * * * take a unified position, we are required to treat all of the directors as one").

actions taken collectively by all that would violate no law if engaged in by a single director acting alone.

The award of punitive damages here further offends the Due Process Clause because of the lack of any relationship between Joe Shoen's purported "state of mind"—which provided the exclusive basis for awarding punitive damages—and the conduct that actually formed the basis for the award of compensatory damages. While a defendant's state of mind is undeniably relevant to determining whether punitive damages should be imposed, the conduct relied on by the courts below to evidence Joe Shoen's purported state of mind was remote in time, unrelated to, and of an entirely different character from the collective action on which liability was based--voting to entrench the existing board of directors. App. 10a & n.7.[8]

This evidence consisted of (1) a letter Joe Shoen wrote to his father more than *six years before* the vote of the board on which Joe's liability was based, expressing "resentment toward his father and siblings," (2) a "bitter" statement about an *unrelated* matter that Joe Shoen made to a third person *almost a year after* the conduct on which liability was based, and (3) a "history of strong feelings, negative feelings" the court concluded Joe had for his father and one of his brothers. App. 13a-15a. A review of this evidence, none of which manifests any unlawful conduct,[9] makes clear that the jury was allowed to enter

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[8] The jury was not required to determine precisely which action of the defendants formed the basis of the breach of fiduciary duty. On appeal, all parties and the Arizona Court of Appeals have acted on the basis that the events of June 23-24, 1988, which prevented respondents from securing a controlling majority of shares, constituted the breach on which compensatory damages were based. App. 10a n.7.

[9] While the trial court relied on only the three incidents discussed above to support the punitive damages award against Joe Shoen, the Arizona Court of Appeals discussed additional evidence in affirming the award of punitive damages. App. 15a-16a. Nearly all of this additional evidence, however, is also remote in time from

punitive damages against Joe Shoen based solely on its subjective assessment of Joe's feelings about his father and one of his brothers. To allow a $7 million punitive damages award on the basis of such perceived resentment towards one's family members, completely divorced from any unlawful conduct, is to invite the very sort of arbitrary decisionmaking that the Due Process Clause forbids. *See BMW*, 116 S. Ct. at 1605 (Breyer, J., concurring) ("Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what *actions* may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.") (citations omitted) (emphasis added); *see also Morrissette* v. *United States*, 342 U.S. 246, 265 n.27 (1952) ("To hold that a mental element is necessary to a [finding of liability] is, of course, not to say that it is all that is necessary.").

The decision on punitive damages below is also contrary to *BMW of North America, Inc.* v. *Gore*, in which this Court noted that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's *conduct*." 116 S. Ct. at 1599 (footnote omitted) (emphasis added). This Court concluded that BMW's conduct was not "particularly reprehensible" in part because the harm inflicted by BMW was purely economic in nature, and because BMW had not engaged in the conduct found unlawful by the jury after being held liable for the same kind of conduct. *Id.* at 1599-600. Similarly here, the plaintiffs' damages were purely economic in nature, and Joe Shoen was not a recidivist wrongdoer. In *BMW*, this Court was reviewing a punitive damage award based on its size, but certainly an award of punitive damages of any size vio-

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the operative unlawful conduct. That which was contemporaneous with the unlawful vote—the failure of Joe Shoen to disclose to the other directors the existence of the voting trust—applied with equal force to the two other sibling defendants.

lates due process when it is based on a factor as arbitrary as whether one member of a board of directors has antagonistic feelings toward a shareholder affected by a vote of the board. *See TXO*, 509 U.S. at 467 (Kennedy, J., concurring) ("When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award.").

In awarding punitive damages, it may be necessary to consider conduct outside of that on which compensatory damages are based in order to determine the amount that will properly punish the defendant and deter future unlawful conduct. *See TXO*, 509 U.S. at 462 ("scheme employed in this case was part of a larger pattern of fraud, trickery and deceit"); *BMW*, 116 S. Ct. at 1593 ("evidence that since 1983 BMW had sold 983 refinished cars as new * * * without disclosing that the cars had been repainted before sale"). This case, however, is unlike *TXO* and *BMW*, where punitive damages were based in part on evidence of additional wrongful or illegal conduct that was *virtually identical* to the conduct for which compensatory damages were imposed. In contrast, the evidence on which the jury was allowed to assess punitive damages here was not evidence of other votes of the board or other actions which had the effect of unlawfully freezing the plaintiffs out of control of the corporation, but instead, as previously discussed, remote incidents of discordant relations between Joe Shoen and several of his family members. Of course, to the extent that the board of directors had engaged in conduct similar to that which formed the basis for compensatory damages, that conduct would equally support punitive damages against all board members voting in the majority, not just Shoen.

In sum, this Court should grant the writ to determine whether the Due Process Clause prohibits an unlimited exercise of discretion that results in an award of punitive

damages against one member of a board of directors for a collective action taken unanimously by the board, where the award of punitive damages is based solely on purported familial ill will separate and apart from any unlawful conduct.

B. The Award of Punitive Damages Is Inconsistent With This Court's Precedents Under the Equal Protection Clause

The judgment below—which awards punitive damages against a single director for an action taken collectively by the entire board of directors—also violates the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause "keeps governmental decision-makers from treating differently persons who are in all relevant respects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992) (citation omitted). A governmental differentiation between similarly situated persons violates the Equal Protection Clause under applicable rational-basis review "when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Heller* v. *Doe*, 509 U.S. 312, 324 (1993) (internal quotations and citations omitted).

The legitimate state interest behind punitive damages awards is "punishing unlawful *conduct* and deterring its repetition." *BMW*, 116 S. Ct. at 1595 (emphasis supplied). That Joe Shoen had negative feelings towards his family members unrelated to any unlawful conduct is irrelevant to the goal of punishing and deterring the conduct found unlawful here—a unanimous vote of the board to take actions that breached the board's fiduciary duty to the plaintiffs.[10] To attempt to deter the unlawful con-

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[10] That the differentiation between Joe Shoen and the other directors was drawn by the judge and the jury instead of the legislature does not insulate it from challenge under the Equal Protection Clause. *See Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 624

duct of a collective board action by punishing a single director with $7 million in punitive damages, based on a jury's reaction to that director's troubled family relationship, draws a classification that "is not only 'imprecise,' but is wholly without any rational basis." *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 538 (1973).

The Arizona Court of Appeals justified the award of punitive damages on Joe Shoen alone on the theory that of all the members of the board, only he acted with the intent necessary to support an award of punitive damages. As we have already discussed, the flaw in that approach is that it ignores that the operative action for all defendants in this case was not only identical, but also that it was action that could only be found unlawful if engaged in collectively. In these circumstances, the relationship between deterring unlawful conduct and punishing Joe Shoen alone to the tune of $7 million for the collective action by the board is "so attenuated as to render the distinction arbitrary [and] irrational." *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 446 (1985).

The guarantee of equal protection is a significant constraint on jury discretion in awarding punitive damages. A central concern reflected in this Court's cases is that punitive damages may be a product of jury passion and prejudice, inflicted to punish an unpopular defendant for reasons unrelated to the dispute at issue in the case. *Honda Motor Co.* v. *Oberg*, 512 U.S. at 429; *BMW*, 116 S. Ct. at 1605 (Breyer, J., concurring). Whether the concern manifests itself in excessive awards against out-of-state companies or against individuals who may not have endeared themselves to the jury, the Equal Protection Clause helps ensure that the unpopular defendant is not

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(1991) ("beyond all question [judge] is a state actor," and describing jury as "an entity that is a quintessential governmental body"); *BMW*, 116 S. Ct. at 1597 n.17.

punished solely for whatever extraneous reason makes him unpopular, by requiring the jury to treat the unpopular defendant no differently than similarly situated but less disadvantaged defendants. It is difficult to envision a clearer case for application of this principle: each of the defendants engaged in *identical* conduct, and the conduct was only effective as a collective act. Yet only one was singled out for punitive damages, in circumstances under which it was clear the jury was expressing its views on that defendant's familial relationships, *not* the conduct at issue in this case.

As this Court has recognized, "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 83 (1988). The Court should grant the writ of certiorari here and ultimately decide that where a defendant is arbitrarily singled out for punitive damages on a basis with no relationship to the underlying unlawful action, such an award violates the Equal Protection Clause.

II. THE QUESTION PRESENTED IS IMPORTANT IN DEVELOPING THE DUE PROCESS AND EQUAL PROTECTION LIMITS ON AWARDS OF PUNITIVE DAMAGES

Despite this Court's recent directives concerning the requirements placed by the Due Process Clause on punitive damages awards, the large variation in these awards suggests that additional guidance to the lower courts is necessary. *See* Cass R. Sunstein, Daniel Kahneman, and David Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2092 (1998) ("After *BMW*, * * * the law governing constitutional constraints on punitive damage awards is in a state of considerable uncertainty and flux.") (footnote omitted); Theodore B. Olson, Theodore J. Boutrous, Jr.,

and Mark A. Perry, *Constitutional Challenges to Punitive Damages after* BMW *v.* Gore, Perspective on Legislation, Regulation, and Litigation, Vol. 2, No. 5 (May 1998) at 10 ("It has been a veritable punitive damages carnival in the twenty months since *BMW* was decided."). Granting the writ here would allow the Court to examine the constraints that due process places on punitive damages awards, based not primarily on the sheer size of the award, but instead on the essential limitation of jury discretion through the required connection between compensatory and punitive awards. In addition, commentators have noted that "[t]here appears to be a marked increase in the number and size of punitive damages awards in business cases." Marc Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, 1415 (1993). Granting the writ to review the decision below would allow this Court to address a punitive damages award in the context of a business-related case where increasing numbers of these awards are being entered.

Moreover, this Court has not yet taken the opportunity to examine the issues raised by punitive damages under the Equal Protection Clause. Granting certiorari in this case would provide the Court with the opportunity to determine the limits placed on punitive damages by that Clause in the context where an individual has been arbitrarily singled out on a basis that has no relevance to punishing or deterring the relevant unlawful conduct. The equal protection issues are brought to the fore by the stark facts of this case and present the Court with an excellent vehicle by which to review the limits placed on punitive damages awards by the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Jul. 24, 1997]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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1 CA-CV 95-0199
Department A

SAMUEL W. SHOEN, M.D.; MARY ANNA SHOEN-EATON; CECILIA M. SHOEN-HANLON; KATRINA M. SHOEN-CARLSON; THERESA SHOEN-ROMERO; MICHAEL L. SHOEN; LEONARD S. SHOEN; and the following Arizona corporations: SAMWILL, INC.; CERMAR, INC.; KATTYDID, INC.; THERMAR, INC.; MICKL, INC.; MARIN, INC.; and L.S.S., INC.,

Plaintiffs-Appellees,
Cross Appellants,

v.

EDWARD J. SHOEN,
Defendant-Appellant,
Cross Appellee.

Appeal from the Superior Court of Maricopa County

Cause No. CV 88-20139

The Honorable Thomas C. Dunevant, III, Judge

MEMORANDUM DECISION
(Not for Publication—Rule 28, Arizona Rules of Civil Appellate Procedure)

WEISBERG, Judge

Plaintiffs were shareholders who sued Edward "Joe" Shoen ("Joe") and other members of AMERCO's board of directors (collectively, "defendants") regarding conduct in 1988 that deprived plaintiffs of majority ownership of AMERCO, the parent company of U-Haul. After a seven-month trial, a jury awarded plaintiffs $1.47 billion in compensatory damages against all defendants and $70 million in punitive damages against only Joe. The trial court, however, granted defendants' and Joe's motions for remittitur, reducing compensatory damages to $461 million, upon tender of plaintiffs' stock, and punitive damages to $7 million.

This appeal concerns only the award of punitive damages. Joe appeals the trial court's denial of his motion for judgment notwithstanding the verdict ("JNOV") or new trial, and plaintiffs cross-appeal the trial court's grant of remittitur. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Leonard Samuel ("L.S.") Shoen founded U-Hall in 1946. Two marriages produced six sons—Sam, Mike, Joe, Mark, Paul, and Jim—and five daughters—Mary Anna Sophia, Cecilia, Theresa, and Katrina.[1] Over the years, L.S. gave large amounts of his U-Haul/AMERCO stock to his children, eventually resulting in 97% of AMERCO's outstanding shares being held by the Shoen family, with employees owning the remainder.

By the mid-1970s, Sam, Mike, and Joe had taken active roles in managing the company, but a conflict had developed between Joe and other members of the Shoen family, particularly L.S., Sam, and Mike. In 1979, Joe left AMERCO because of the conflict and because he was

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[1] A third marriage produced another son, Scott, who was a minor at the time of the incidents at issue here.

upset that L.S. had chosen Sam and Mike rather than him as L.S.'s successors in the business.

In 1982, Joe wrote a letter to L.S. which, though stating his respect for his father, also expressed his bitterness as his position *vis-a-vis* his siblings:

> In response to your letter, I am out of U-Haul. If you want to goof off then please do as you want.
>
> You have my never ending respect as my father, as a great organizational talent. In my view you have chosen your subordinates, *and you have elected not to choose me.*
>
> I hope that you recognize that while as your child I owe my life to you many times over, that merely puts me on par with all your other children. Recall that when you have been ill, I have always recognized the debt I owe you, and acted in a manner reflecting that debt.
>
> *The children you have chosen as your subordinates and successors in U-Haul have never offered to carry their own weight let alone help carry part of your burden.*
>
> . . . . U-Haul is an organization to which I belong only as a shareholder. U-Haul has been playing with me.
>
> . . . .
>
> I will be a testament to what you have told me many times. "Shirt sleeves to shirt sleeves in 3 generations." I am tired of being called a failure. I have excelled at being your son. I work hard, I am honest. Tell that to your dope smoking children. [Emphasis original.]

This letter became known as the "heir-apparent letter."

Following his departure from the company, Joe retained 10% of AMERCO's shares and, along with Mark,

made continued attempts to oust L.S. and Sam from AMERCO's Board of Directors ("the Board"). In late 1986, in order to resolve their dispute, the family members entered a mediation process, which primarily involved Sam, Mike, Joe, and Mark. According to Sam, Joe was not participating in good faith and was very aggressive towards Sam and Mike. The professional mediator voluntarily resigned "because he was no longer objective about the behavior of Joe and Mark." The mediation resulted in an agreement that any family member could be on the Board unless any other family member had an objection, i.e., each person "could basically have veto power." Everyone who expressed the desire therefore became a director except Mike, who Joe vetoed "in an extremely abusive and hostile fashion just . . . short of violence." The mediation ultimately resulted in Joe becoming Chairman of the Board, Sam becoming President, and L.S. stepping down.

Sam eventually resigned as President. Exploring options for selling his AMERCO shares, Sam asked Joe if the company would be interested in buying them. "[I]n a very hostile and angry fashion," Joe offered to buy them at ten cents on the dollar, which Sam declined. Also, in early 1988, the company declared a dividend for all shareholders but withheld Sam's without reason, requiring him to sue the company to get it.

In mid-1987, many family shareholders expressed a desire to "achieve some liquidity" in their stock. By informal resolution, the Board agreed to investigate options and formed a committee to do so. The committee narrowed the options to a proposal by one investment banking firm, but Joe, who was a member of the committee, objected, resulting in no action being taken.

A shareholders' advisory meeting was held on July 16, 1988. During a break in the meeting, Sam discovered Joe reading through Sam's notes. When Sam told Joe he wanted his notes back, Joe refused to return them

and began yelling obscenities at Sam and screaming, "You want to sell the company." At that point, Joe charged Sam, grabbed one of his arms, and began swinging him. Their brother, Paul, then joined in the attack, grabbing Sam's other arm. Joe and Paul were on the verge of slamming Sam against the wall when Mike intervened and broke up the melee. The meeting then adjourned.

Several of the family members ("plaintiffs")[2] reassembled the next day to discuss shareholder liquidity options and the possibility of selling the company. Plaintiffs reached an agreement to attempt to maximize the liquidity and value of their stock. They then made plans to meet with Bear Stearns, an investment banking firm in New York, to discuss their options. They also filed documents with the Securities and Exchange Commission indicating that they had joined together for this purpose.

The effect of the plaintiffs' agreement was to form a controlling plurality of ownership through a voting trust. It resulted in plaintiffs controlling 49.66% of the company, versus Joe's control of slightly less than 46%. L.S. then traveled to Portland, Oregon to convince the trustee for the shares held in trust for Scott to join their alliance. Scott's shares represented 2.54% of the company and would have given plaintiffs an absolute majority, thus permitting all the Shoens to sit on the Board and fully explore all available liquidity options. The trustee eventually did consent to joining the alliance, but only after the events of July 22-24, 1988.

On July 22, 1988, Joe came into possession of a recorded conversation between Sam and his attorney, which alerted him to the plaintiffs' planned meeting in New York that weekend and their desires with respect to their shares.

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[2] The plaintiffs are L.S., Sam, Mary Anna, Cecilia, Theresa, Katrina, Mike, and their respective corporations, each of which held AMERCO stock on behalf of its principal.

That evening, he played the tape for his brother Mark (who was not a director) and then destroyed it.[3]

Joe then called a special meeting of the Board for Sunday, July 24, 1988. At the meeting, he informed the rest of the Board about plaintiffs' attempt to gain a majority. He also told the Board

> [t]hat a corporate raider was going to take over [the company], named Paul Bilzarian, that an investment banking firm who [he] believed to be at that time Drexel Burnham was arranging the financing. [Plaintiffs'] intent was to sell the company in pieces and basically destroy the organization.

In fact, there is no evidence to indicate that Bilzarian, an attorney known in the 1980s for advising on corporate takeovers, was ever involved, and the only basis for Joe's misinformation was his knowledge that Sam had attended business school with Bilzarian, had lunch with him "somewhere in the recent past," and was visiting New York, where Bilzerian apparently worked. Joe failed to inform either the Board or the attorney (Jock Patton) advising the Board at the meeting of the basis for his knowledge regarding plaintiffs' actions.

At approximately midnight on Sunday, July 24, 1988, in response to the perceived threat posed by plaintiffs, the Board voted to adopt the following plan. In order to divest plaintiffs of a controlling majority, the Board issued

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[3] Joe testified to some rather mysterious circumstances surrounding his acquisition of the tape. He testified that an unknown woman phoned him after business hours at the U-Haul headquarters, saying that she had something he needed to hear. She then came to his office, gave him the tape, refused to identify herself, and left. Joe had never seen her before and has not seen her since. No one, other than Mark, who provided no testimony on this, had ever heard of the tape until Joe testified at trial. Therefore, the only evidence to support even the existence of the tape was Joe's uncorroborated testimony.

the remaining authorized and unissued 8,099 AMERCO shares to five inside employees. Each share was valued at $2,715.00, totalling almost $22 million. Each of the five employees made a down-payment of approximately $162,000.00 and then paid the balance by virtue of a 5-year, non-recourse promissory note secured by the newly-issued shares. To finance the down payments, Joe gave each employee a loan from his children's conservatorship accounts. The employees then gave the authority to vote their shares to the Board, which in turn gave this authority to Joe.

Before the Board meeting, Joe met with four of his siblings—Paul and James, who were directors, and Mark and Sophia, who were not—and the five formed a voting trust, which was not disclosed to either Patton or the other directors. The agreement provided that: 1) the shares of the five members must be voted as a block (determined by a majority of the members); 2) the shares would be voted against any corporate sale or merger that was not unanimously approved (i.e., any member could veto such a transaction); and 3) the proxies for the shares would be given to James if a majority vote could not be ascertained. The result of the subsequent Board's action, therefore, was to give Joe and his voting trust over 50% of the AMERCO shares, thereby divesting plaintiffs of their controlling majority.

Plaintiffs knew nothing of the Board's action and, on July 28, 1988, filed with AMERCO's general counsel a signed consent of what they believed to be a true majority of shareholders. The consent did not remove any of the existing directors but added all existing family shareholders to the Board. Plaintiffs learned of the Board's action only when their consent was rejected as not representing a majority of shareholders. Plaintiffs then commenced this litigation.

In addition to the above facts, plaintiffs produced evidence of various other acts by the Board that occurred

after July 1988, which included the following, by way of example: days after filing the consent, the Board canceled plaintiffs' health insurance, which had been provided by the company; shareholder meetings were held in the middle of the desert and voting made difficult; and a "poison pill" provision was inserted into the preferred shares in order to discourage a takeover of the company. Plaintiffs in general presented evidence of many acts taken by the Board that had the effect of limiting or eliminating plaintiffs' ability to exercise any control over the company, or obtaining liquidity for their stock.[4]

Prior to submitting the case to the jury, defendants filed a motion for directed verdict on the issue of punitive damages, arguing that plaintiffs had failed to present sufficient evidence to warrant punitive damages. The trial court granted the motion with respect to all defendants except Joe. The jury then returned a verdict finding that defendants had breached their fiduciary duty to plaintiffs. The jury awarded damages based upon what it determined to be the difference between the value of the plaintiffs' stock in 1988 and the date of verdict: $1.47 billion. The jury also awarded punitive damages against Joe in the amount of $70 million.

Defendants then filed motions for remittitur, which the trial court granted. It reduced the compensatory damage award to $461 million, upon tender of plaintiffs' stock, and the punitive damage award to $7 million. Plaintiffs accepted the remittitur rather than electing a new trial. The trial court then entered judgment for these amounts, ordering that, upon payment of the compensatory damages, plaintiffs must transfer their stock to defendants.

Joe has appealed the trial court's denial of his motion for JNOV or new trial. Plaintiffs have cross-appealed the trial court's grant of remittitur. Neither the compensatory

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[4] Additional relevant facts will be discussed in our analysis of the issues.

damage award nor the trial court's remittitur of it is at issue here.

DISCUSSION

I. JOE'S APPEAL [5]

A. *STANDARD FOR PUNITIVE DAMAGES*

The parties agree that, because AMERCO is a Nevada corporation, Nevada law controls the substantive issues of this litigation, and the trial court therefore used the Nevada standard for awarding punitive damages. In Nevada, the prerequisites for an award of punitive damages are established by statute. Nev. Rev. Stat. Ann. ("N.R.S.") section 42.005(1) provides, in part:

> [I]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant.

Thus, a plaintiff must prove "oppression, fraud or malice" on the part of the defendant. Nevada courts have interpreted these terms to require proof that the defendant had "a deliberate intention to injure, vex, annoy or harass." *Craigo v. Circus-Circus Enters.*, 786 P.2d 22, 27 (Nev. 1990). The Nevada Supreme Court also stated in *Craigo* that punitive damage awards based on malice should be restricted "to those extreme cases that convincingly demonstrate conduct motivated by hatred and ill-will and the deliberate intent to injure. . . . It is the evil motive to injure that must be shown directly or by inference as a

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[5] In an opinion filed concurrently with this memorandum decision, we concluded that the standard for reviewing the trial court's denial of Joe's motion for JNOV is *de novo*. *See Shoen v. Shoen*, 1 CA-CV 95-0199.

predicate for a punitive award based upon malice." *Id.* at 26-27.[6]

In addition, evidence to support punitive damages must be clear and convincing. N.R.S. § 42.005(1). However, the distinction between clear and convincing evidence and evidence that merely constitutes a preponderance is solely a question of the weight of the evidence, and therefore is a matter for the trier of fact, not this court. *Gilbert v. Board of Med. Examiners*, 155 Ariz. 169, 181, 745 P.2d 617, 629 (App. 1987). Accordingly, we review only for whether evidence exists to support the award of punitive damages, not whether such evidence is clear and convincing. *Id.*

B. *THE EVIDENCE SUPPORTS THE PUNITIVE DAMAGE AWARD*

We begin by noting that we are concerned only with the award of punitive damages. Because Joe has not appealed the jury's verdict that he and the other defendants breached their fiduciary duty to plaintiffs, we accept that such a breach occurred. We further note that the jury was not given the opportunity to specify precisely which of defendants' acts constituted the breach. We therefore need not determine which of the numerous acts alleged to be breaches by plaintiffs were actually breaches, whether independently or collectively.[7]

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[6] The instructions given to the jury in the instant case provided: "In order to prove oppression, fraud, or malice, express or implied, Plaintiffs must prove conduct . . . motivated by hatred and ill-will and the deliberate and evil intent to injure Plaintiffs." The jury's special verdict form contained similar language. The parties did not object to this instruction.

[7] Both parties focus their discussion primarily on the events of the weekend of July 23-24, 1988, which deprived plaintiffs of a controlling majority, and the parties' computation of damages also focused on this as the significant breach.

1. *Joe's Failure to Take Action Apart from the Board*

Joe first argues that puntive damages should not have been awarded against him because the actions forming the nucleus of the breach of fiduciary duty were taken by the Board as a whole. Because all other defendants were granted a directed verdict on punitive damages, Joe claims that "it would be wholly illogical to conclude that [he] was somehow acting with an 'evil motive to injure' when he took the *identical* actions that the other [defendants] took—actions that, as a matter of law, did not allow the other [defendants] to be subjected to punitive damages." [8] We disagree.

The basis for the trial court's rulings on defendants' motion for directed verdict on punitive damages was that, except for Joe, there was no evidence that the defendants acted with malice, while there *was* evidence to support a finding that Joe did. It is immaterial whether Joe took the same actions as the other defendants because the issue is whether those actions were taken with the requisite state of mind.

For example, it is possible for two defendants to take the same action, even acting in concert, that results in a breach of fiduciary duty, with only one of them acting with malice. It is also possible that both acted with malice but that there was sufficient evidence to support such a finding against only one. In either instance, punitive damages would be assessed properly against only one of the defendants, even though both participated equally in the breach.

> [T]he majority of courts allow the jury to make different punitive awards against joint tortfeasors, even when the defendants are liable jointly and severally

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[8] Joe concedes that an award of punitive damages against only one director would be permissible in a case when that director dominated or deceived the other directors.

> for compensatory awards. The evidence must show the different degrees of culpability among the tortfeasors. Punitive damages may be awarded against one or more defendants and not against others depending on their culpability.

1 Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* § 4.4(B)(2)(b)(3), at 186 (3d ed. 1995) (footnotes and citations omitted); *see also* 5 Marilyn Minzer, *et al.*, *Damages in Tort Actions* § 40.06[4], at 40-243 to 40-244 (1996). Accordingly, we reject Joe's argument that punitive damages against him were improper simply because the other defendants obtained a directed verdict.[9]

2. *Advice of Counsel*

Joe also argues that punitive damages were improper because he, like the rest of the Board, acted on the advice of counsel in taking the actions that formed the foundation of the breach. A defendant's good faith reliance on the advice of counsel may preclude an award of punitive damages. *See Angell v. Leslie*, 832 F.2d 817, 821-22 (4th Cir. 1987); *Huggins v. Deinhard*, 127 Ariz. 358, 360, 621 P.2d 45, 47 (App. 1980); *Pre-Fit Door, Inc. v. Dor-Ways, Inc.*, 13 Ariz. App. 438, 441, 477 P.2d 557, 568 (1970); *Fox v. Aced*, 317 P.2d 608, 610 (Cal. 1957).[10]

We conclude, however, that this advice of counsel "defense" does not preclude punitive damages here because

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[9] We also note the possibility that the trial court erred in directing a verdict on punitive damages in favor of the other directors, which plaintiffs have not appealed.

[10] Regarding advice of counsel, the jury was instructed, without objection, as follows:

> In determining whether damages are appropriate, you may consider [Joe's] reliance upon the advice of counsel in taking the actions challenged by Plaintiffs. Such reliance upon the advice of counsel may negate the existence of oppression, fraud, or malice, express or implied, upon which a damage award must be based.

there is evidence that Joe's reliance, if any, was not in good faith. Patton gave his advice with the objective of "forc[ing] a negotiation on a level playing field between the board on the one hand who has a duty to all stockholders . . . and the insurgents who are acting out of self-interest." The goal, according to Patton, was to issue shares to a "neutral third party" in order to prevent shifts in the two Shoen factions, which were fairly balanced, from damaging the company.

Patton's advice to the Board, however, was based upon what Joe knew to be incomplete information. First, Joe did not inform Patton of the voting trust he had formed with some of his siblings that controlled 45.8% of AMERCO's shares. Second, Patton was unaware of the plan to have the new employee shareholders give proxies for their shares to Joe. Not knowing these facts, Patton was unaware of the effective result of his advice: to place complete control over a majority of the shares in the hands of Joe and the members of the voting trust. From this evidence, the jury could reasonably conclude that, to the extent Joe relied on the advice of counsel, it was not in good faith.

3. *Evidence of Malice*

In denying defendants' motion for directed verdict with respect to Joe, the trial court highlighted three pieces of evidence that could support a finding of malice on Joe's part. The court made it clear that it considered these only to be examples and not exhaustive. At any rate, we agree with the trial court that these examples are sufficient to support the punitive damages award.

The trial court first relied upon the "heir-apparent" letter. This letter reflected that Joe was bitter about L.S.'s choice of Sam and Mike as his "successors." He referred to his siblings as "your dope smoking children," and accused them of not "carry[ing] their own weight" or helping L.S. with his burden. He further accused U-Haul of "play-

ing with" him and angrily renounced any interest in U-Haul other than as a shareholder.

Joe argues that the letter does not indicate any ill-will because, in it, he told L.S. that he respected him as his father and "a great organizational talent." However, in writing the letter, Joe underlined certain parts, and thereby emphasized his resentment towards his father and siblings, rather than his respect for L.S. In any event, the letter contained statements that support an inference of ill-will to which the jury was free to attach more weight.

The trial court also relied upon what it referred to as another letter written by Joe. Joe correctly points out that the letter referred to was not written by Joe, but by an attorney, Steve Case, and that the trial court had sustained a hearsay objection to its introduction into evidence. Notwithstanding, Case's testimony regarding his conversation with Joe, which was the subject of the letter, is in the record without objection, and it supports an inference of malice.

Case testified that he had a conversation with Joe in May 1989, in which Joe told him that he "was bitter about attacks upon his family, and about process servers waiting and serving his children." Case also relayed to plaintiffs that Joe threatened to make "life as difficult as possible under any pretext" for them. He also testified that Joe had specifically hired someone to accomplish this task.

Joe argues that this evidence is not probative of malice because Case further testified that, when he originally used the term "life," he had exaggerated. Case testified that he had used the term "[p]erhaps loosely," and really meant only certain transactions that were the subject of his conversation with Joe, which apparently dealt with plaintiffs seeking to transfer their personal corporations to Nevada and having AMERCO therefore issue new stock certificates to them. Nevertheless, regardless of the precise context of Joe's comment, the jury could reasonably infer from

it a general ill-will toward plaintiffs and a desire to thwart their efforts at exercising their rights as shareholders.

The trial court finally relied upon Joe's "history of strong feelings, negative feelings" for L.S. and Sam. The trial court did not mention specific instances, stating only that:

> there is [Joe's] conduct, both his conduct in speech and his conduct with respect to [Sam], and also his conduct in speech with respect to [L.S.], that would suggest that there is enough for a jury to decide whether or not he is motivated by spite and ill will.

Conduct and speech by Joe toward L.S. and Sam that would support a finding of malice include the following. In February 1989, Joe terminated L.S.'s lifetime employment agreement for the ostensible reason that "L.S. ha[d] repeatedly failed to act in the best interests of AMERCO." In addition, Joe behaved in a "very aggressive" manner toward Sam at the mediation process in late 1986, and, when Sam asked about selling his AMERCO shares, Joe became "extremely abusive and hostile," offering only ten cents on the dollar. Furthermore, Joe physically assaulted Sam at the July 1988 shareholders meeting and nearly "slammed [him] against the wall." This evidence, which is not exhaustive, clearly supports an inference that Joe acted with malice when breaching his fiduciary duty to plaintiffs.

In addition to the examples given by the trial court, the record also includes other evidence to support a finding of malice on Joe's part. For instance, the record contains evidence that Joe failed to fully disclose to the non-Shoen directors and Patton facts that could have been material to their actions at the July 24 Board meeting. He did not disclose the voting trust that controlled 45.8% of the then-outstanding shares, nor that he had gained much

of his information from confidential communications between Sam and his attorney.[11]

Joe's ill-will and intent to injure plaintiffs is further illustrated by a second physical assault, seemingly even more violent than that against Sam. At a shareholders' meeting in March 1989, Mike was assaulted by Joe and Mark (who is not a defendant). Joe held Mike's arms while Mark "pound[ed Mike] with his fists." This episode shows an intent on the part of Joe to injure Mike, one of the plaintiffs here.

Joe's primary argument against all this evidence is that it is too remote in time from and unconnected to the actions that constituted the breach. This characterization, however, is inaccurate. For example, Joe's failure to fully disclose material facts to the Board was, if not a component of the breach itself, directly connected to it. Also, Joe's assault on Sam occurred only a week before the critical weekend of July 23-24, 1988, and was precipitated, at least in part, by Joe's anger over Sam's perceived desire to sell the company, a contributing factor behind Joe's breach. In addition, although the "heir-apparent" letter was written approximately six years prior to the breach, it too was arguably connected to the breach because it was precipitated by resentment over L.S. and Joe's siblings' control of the company.

Although Joe correctly argues that, to support punitive damages, plaintiffs must prove that Joe "was motivated by an evil intent to injure *in taking the actions that constitute the alleged breaches of fiduciary duty*," (emphasis deleted (he incorrectly contends that the evidence used to establish such an intent must be limited to actions

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[11] Regarding this latter point, the pure implausibility of Joe's story could have enabled the jury to conclude that Joe had either fabricated the entire event or had, in fact, ordered the surreptitious taping himself.

that constitute the breach. N.R.S. section 42.005(1) explicitly states that punitive damages are appropriate "where it is proven . . . that the defendant has been guilty of . . . malice, *express or implied.*" (Emphasis added.) Nevada courts have consistently held that the term "express or implied" refers to "the evidence by which malice is established," *Nevada Credit Rating Bureau, Inc. v. Williams,* 503 P.2d 9, 14 (Nev. 1972); *Craigo,* 786 P.2d at 23, and that malice may be proven by inference. *See First Interstate Bank v. Jafbros Auto Body, Inc.,* 787 P.2d 765, 767 (Nev. 1990); *Craigo,* 786 P.2d at 26-27.

Thus, any evidence that implies that a defendant acted with an intent to injure when committing the breach will support punitive damages, regardless whether such evidence is otherwise connected to the breach. All the evidence discussed above supports an inference that Joe had ill-will toward plaintiffs and therefore acted with malice in breaching his fiduciary duty to them.

For similar reasons, we reject Joe's argument that the above evidence is too remote in time. First, as noted above, some of the conduct occurred during or very close in time to the breach. Second, remoteness in time goes to the weight of evidence, not its relevance. *Hawkins v. Allstate Ins. Co.,* 152 Ariz. 490, 499, 733 P.2d 1073, 1082 (1987); *State v. Paxton,* 186 Ariz. 580, 587, 925 P.2d 721, 728 (App. 1996). "While a significant time span may reduce the probative force of evidence, it does not eliminate it." *Hawkins,* 152 Ariz. at 499, 733 P.2d at 1082. In *Hawkins,* the supreme court held that evidence of wrongful procedures 15 years earlier was not too remote to support an insurer's wrongful state of mind for the purpose of imposing punitive damages. Similarly, the evidence of Joe's ill-will toward plaintiffs, none of which occurred more than six years from the breach, was not too remote to support punitive damages here.

We therefore conclude that the record contains substantial evidence that Joe acted with malice when breaching his fiduciary duty to plaintiffs, and that the trial court therefore did not err in denying Joe's motion for JNOV.[12]

4. *Grant of Remittitur*

Joe lastly argues that the trial court's grant of remittitur demonstrated its recognition that the verdict was defective. This argument is meritless. The trial court's grant of remittitur demonstrates only the trial court's conclusion that the amount of punitive damages was "clearly excessive." It has no bearing upon the issue whether substantial evidence supports an award of punitive damages, in general.

II. PLAINTIFFS' CROSS-APPEAL

Plaintiffs cross-appeal the trial court's grant of remittitur, which reduced the jury's punitive damage award from $70 million to $7 million. The trial court concluded that the award was excessive pursuant to the standard established by the Nevada Supreme Court in *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 746 P.2d 132, 136-37 (Nev. 1987), which all parties concede is controlling. The court in *Ace Truck* set forth the standard for reducing a jury award of punitive damages, and the factors that the trial court may consider:

> Punitive damages are legally excessive when the amount of damages awarded is *clearly* disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor under the circumstances of a given case.
>
> . . . .

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12 Although we have noted that on review we need not determine whether the evidence was clear and convincing, *see Gilbert*, 155 Ariz. at 181, 745 P.2d at 629, we nevertheless conclude that the evidence presented was strong enough for the jury to so find.

> In arriving at the ultimate judgment of where excessiveness begins, courts can legitimately take into account any circumstances which relate to the limits of punishment and deterrence that can be properly imposed in a given case. Relevant circumstances include such matters as the financial position of the defendant, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of this kind.
>
> As can be readily understood, these factors are largely common sense considerations which relate in everyday terms to the judgment of what goes beyond fair and proportionate punishment and reasonable deterrence under the circumstances. The ultimate question remains the same: Whether the fact finder has clearly exceeded the reasonable bounds of punishment due and justifiable deterrence as related to the acts complained of.

Id (footnotes omitted).

We review the trial court's grant of remittitur for abuse of discretion. *Mammo v. State*, 138 Ariz. 528, 133, 675 P.2d 1347, 1352 (App. 1983); *Torres v. North Am. Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1982). Thus, we must determine whether the trial court abused its discretion in finding that the jury's punitive damage award was "clearly excessive" under the guidelines of *Ace Truck*.

Joe contends that we must affirm the trial court's ruling for three reasons: 1) the trial court did not abuse its discretion under *Ace Truck*; 2) plaintiffs are estopped from contesting the remittitur because they filed a claim for the reduced amount in defendants' bankruptcy pro-

ceeding;[13] and 3) the trial court was constitutionally required to reduce the amount to comport with due process. Because we conclude that, pursuant to the factors set forth in *Ace Truck*, the trial court did not abuse its discretion in finding the $70 million punitive award clearly excessive, we need not consider Joe's other two arguments.

Plaintiffs argue that the trial court's primary reason for finding the verdict excessive was that it was so much larger than any other punitive damage award in a reported Nevada case,[14] which is an insufficient basis for remittitur. We agree that that reason would be insufficient, but disagree that it was the basis for the trial court's conclusion. Rather, the trial court focused mainly upon a comparison of the amount of the award and Joe's net worth.

Nevada courts have consistently held that the defendant's financial situation, and the punitive damage award's effect on his net worth, is a valid and important consideration in determining whether the award is excessive. *See, e.g., Republic Ins. Co. v. Hires*, 810 P.2d 790, 793 (Nev. 1991); *S.J. Amoroso Constr. Co. v. Lazovich & Lazovich*, 810 P.2d 775, 778 (Nev. 1991); *Ainsworth*, 763 P.2d at 677; *Ace Truck*, 746 P.2d at 135, 137. "[T]he amount of punitive damages assessed should be sufficient

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[13] Following the jury verdicts in this case, Joe filed for Chapter 11 bankruptcy. In the bankruptcy proceedings, plaintiffs filed claims for their punitive damage award in the amount of $7 million. This amount was subsequently reduced to $6 million when plaintiff Mary Anna settled her punitive damage claim for $1 million. Joe's confirmed Plan of Reorganization provided for payment of plaintiffs' $6 million claim. The claim, however, remained disputed, with plaintiffs contending it was nondischargeable in bankruptcy, and, based upon the record before us, there has been no ruling on this issue by the bankruptcy court.

[14] The trial court found, and the parties agree, that the largest reported punitive damage award in Nevada is $6 million. *See Ainsworth v. Combined Ins. Co.*, 763 P.2d 673 (Nev. 1988).

to punish a wrongdoer and deter others from acting in a similar manner *without financially annihilating the defendant.*" *Ace Truck*, 746 P.2d at 135 (emphasis added).[15]

In fact, the court's reduction of the punitive damage award in *Ace Truck* was based primarily upon this factor. The two defendants in that case had net assets worth $1,626,000.00 and $705,700.00, before deducting the compensatory damages of $391,049.00 The jury awarded punitive damages of $500,000.00 and $300,000.00 against them, respectively. The court held:

> The compensatory award, quite large under the circumstances, reduces the estate of each defendant substantially. If [each defendant] had to pay half of the $391,049.00 compensatory award, then the punitive award against [one defendant] would be calculated at forty-three percent of his assets, and the punitive award against [the other] would be calculated at seventy percent of his assets. These are indeed excessively and disproportionately punitive under the circumstances. We hold the awards to be clearly excessive and disproportionate as a matter of law.

Ace Truck, 746 P.2d at 138.

In the instant case, plaintiffs concede that the only evidence of Joe's assets was his AMERCO stock, which was worth approximately $70 million (which is presumably how the jury determined the amount of its verdict),

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[15] The court in *Ace Truck* held that this "financial annihilation rule" is insufficient as a general rule because many punitive damage awards can be excessive without rising to the annihilation level. The court, however, stated that the rule still applies "in clear cases where the defendant is being wiped out," as in *Miller v. Schnitzer*, 371 P.2d 824 (Nev. 1962), where the defendant with assets of $51,000.00 was initially assessed $45,000.00 in compensatory damage and $50,000.00 in punitive damages. *Ace Truck*, 746 P.2d at 135.

a recent $2 million bonus from AMERCO, and an annual salary of $200,000.00, which covered his living expenses.[16] Based on this evidence, the $70 million punitive damage award was nearly 100% of Joe's current assets, even without taking into account Joe's joint and several liability for the $461 million of compensatory damages. Under these circumstances, we cannot conclude that the trial court abused its discretion in finding that the "jury's award is far more 'than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct,' " quoting *Ace Truck*, 746 P.2d at 137.

This is particularly true when one considers the nature of the conduct[17] and injury at issue here. *See Ace Truck*, 746 P.2d at 137. While we cannot be certain of the precise conduct that the jury found to constitute the breach, the crux of plaintiffs' complaint was that defendants had destroyed the value of their stock, wrongfully deprived them of majority control of the company, and restricted their ability to liquidate their shares and exercise their rights as shareholders. Thus, the resulting injuries were primarily financial.

We also note that plaintiffs were not particularly vulnerable victims. All are college graduates, many with advanced professional degrees, and appear to have been fairly sophisticated with respect to financial and corporate matters. *See id.; cf. Ainsworth*, 763 P.2d at 677 (plaintiff "highly vulnerable" due to devastating stroke that rendered him unable to communicate effectively, requiring

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[16] In post-verdict motions, Joe attempted to introduce additional facts regarding his financial situation, but the trial court refused to consider them. This ruling has not been challenged on appeal.

[17] We note that the conduct relevant to the determination whether the punitive award was clearly excessive is only that conduct constituting the breach, not the extrinsic evidence used to show Joe's malice.

him to deal with defendant insurer through his wife, who was "inexperienced in handling business matters"). Under these circumstances, the trial court was within its discretion to conclude that Joe's conduct and plaintiffs' injury did not warrant a punitive award of $70 million which, according to the available evidence, would wreak financial annihilation.

For these same reasons, we conclude that the trial court did not abuse its discretion in fixing the amount of punitive damages at $7 million, or approximately 10% of Joe's then-current assets, even without consideration of his responsibility for the enormous compensatory damages awarded. Based on the nature of Joe's conduct and the injury to plaintiffs, the trial court did not abuse its discretion in concluding that this amount was sufficiently "necessary and fairly deserved in order to punish [Joe] and deter others from similar conduct." *See Hires*, 810 P.2d at 793 (reducing jury's punitive damage award from 13% of the defendant insurance company's net worth to less than 3%). Accordingly, we affirm the trial court's grant of remittitur.

CONCLUSION

For the foregoing reasons, we affirm the trial court's denial of Joe's motion for JNOV and grant of Joe's motion for remittitur.

/s/ Sheldon H. Weisberg
SHELDON H. WEISBERG
Judge

CONCURRING:

/s/ Susan A. Ehrlich
SUSAN A. EHRLICH
Presiding Judge

/s/ Sarah D. Grant
SARAH D. GRANT
Judge

APPENDIX B

SUPREME COURT
STATE OF ARIZONA

March 19, 1998

RE: SAMUEL W. SHOEN, M.D./MARY ANNA SHOEN-EATON *et al* vs. EDWARD J. SHOEN
Supreme Court No. CV-97-0394-PR
Court of Appeals No. 1 CA-CV 95-0199
Maricopa County No. CV 88-20139

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 17, 1998, in regard to the above-referenced cause:

ORDERED: Petition for Review [Appellant Edward Shoen]—DENIED.

FURTHER ORDERED: Cross-Petition for Review [Appellees Samuel Shoen et al]—DENIED.

Chief Justice Zlaket and Justice Martone recused themselves and did not participate in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix, this 19th day of March, 1998.

NOEL K. DESSAINT, Clerk

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
FOR THE COUNTY OF MARICOPA

No. CV 88-20139

SAMUEL W. SHOEN, M.D., *et al.*,
Plaintiffs,

vs.

EDWARD J. SHOEN, *et al.*,
Defendants.

ORDER DENYING APPLICATION FOR PRELIMINARY INJUNCTION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT THEREOF

At the conclusion of testimony and the presentation of evidence on the hearing for Preliminary Injunction, the Court considered memoranda submitted by the parties, various testimonial affidavits and designations of deposition testimony along with the proposed Findings of Fact and Conclusions of Law and objections thereto filed by the parties.

Having done so, IT IS HEREBY ORDERED denying Plaintiffs' Application for a Preliminary Injunction, the Court FINDING that no irreparable injury will result to the Plaintiffs by failing to grant same and for the additional reasons set forth in those Findings of Fact and Conclusions of Law adopted by the Court as follows:

The Court adopts those proposed Findings of Fact and Conclusions of Law submitted by the Defendants as they are modified in this Order and denies the Findings of Fact and Conclusions of Law proposed by the Plaintiffs except insofar as the same are not inconsistent with the Findings and Conclusions adopted by the Court.

FINDINGS OF FACT

I.

THE PARTIES

Plaintiffs.

1. Katrina M. Shoen, SAMWILL, Inc., MICKL, Inc., MARAN, Inc., CEMAR, Inc., KATTYDID, Inc., THERMAR, Inc., and L.S.S., Inc. (collectively the "Plaintiffs") are each alleged to be beneficial owners of stock in Amerco. Although there is some confusion at present over actual title to the stock because of the lapse of the corporate charters of all of the personal holding companies of the Shoen family members, title to the stock must rest either in the corporate plaintiffs or the individuals who owned the stock of the lapsed corporation. For purposes of the present proceedings, it matters only that there are some plaintiffs who own stock and have standing to pursue this action and the Court finds that such plaintiffs do exist.

2. Samuel W. Shoen, M.D., at all material times, was the beneficial owner of 10,104.81 shares of Amerco stock held of record by SAMWILL, Inc., an Arizona corporation he controls. Samuel W. Shoen was the President of U-Haul International or Amerco between 1979 and February 6, 1987.

3. Michael L. Shoen, at all material times, was the beneficial owner of 10,089.81 shares of Amerco stock held of record by MICKL, Inc., an Arizona corporation he controls.

4. Mary Anna Shoen-Eaton, at all material times, was the beneficial owner of 8,357.69 shares of Amerco stock held of record by MARAN, Inc., an Arizona corporation she controls.

5. Cecelia M. Shoen Hanlon, at all material times, was the beneficial owner of 5,829.96 shares of Amerco stock held of record by CEMAR, Inc., an Arizona corporation she controls.

6. Katrina M. Shoen, at all material times, was the beneficial owner of 5,041.55 shares of Amerco stock held directly by her or by KATTYDID, Inc., an Arizona corporation she controls.

7. Theresa M. Shoen, at all material times, was the beneficial owner of 4,129.11 shares of Amerco stock held of record by THERMAR, Inc., an Arizona corporation she controls.

8. Leonard S. Shoen, at all material times, was the beneficial owner of 2,083.55 shares of Amerco stock held of record by L.S.S., Inc., an Arizona corporation he controls. Leonard S. Shoen was the founder of U-Haul and was Chairman of the Board of Amerco from its incorporation to December, 1986.

Defendants.

9. Defendant Amerco is a corporation organized and existing under the laws of the State of Nevada. Amerco's principal offices and place of business are in Maricopa County, Arizona. Amerco is a publicly-held corporation. U-Haul International, Inc. ("U-Haul") is a wholly-owned subsidiary of Amerco.

10. Edward J. Shoen, Paul F. Shoen, James P. Shoen, Aubrey K. Johnson, William E. Carty and John M. Dodds (collectively the "Director Defendants"), were each directors of Amerco in July, 1988.

11. Edward J. Shoen, at all mateiral times, was the beneficial owner of 10,107.81 shares of Amerco stock

held of record by EJOS, INC., an Arizona corporation he controls. Edward J. Shoen became the Chairman of the Board of Amerco in December, 1986 and became the President of U-Haul in February, 1987.

12. Paul F. Shoen, at all material times, was the beneficial owner of 9,055.06 shares of Amerco stock held of record by PAFRAN, Inc., an Arizona corporation he controls. Paul Shoen is President of U-Haul, the service arm of the Amerco Affiliated corporations.

13. James P. Shoen, at all material times, was the beneficial owner of 6,540.06 shares of Amerco stock held of record by JAPAL, Inc., an Arizona corporation he controls.

II.

THREAT TO AMERCO ON JULY 14, 1988

What the Amerco Board Knew as of July 24, 1988.

14. On July 24, 1988, the Amerco Board was aware of a number of facts that suggested a threat to the continued operation of the company. Over the course of several months preceding the weekend of July 23-24, 1988, the Board and management of Amerco had received information from various sources to the effect that two or more dissident shareholders were involved in discussions regarding an effort to sell Amerco, probably by dismantling it and selling it in pieces. The information became more detailed by that weekend, to the point that the Board could reasonably conclude that a number of shareholders had formed a group for the purpose of taking concerted action to sell or liquidate Amerco without consultation with the present Board or exiting management.

How The Amerco Board Feared Plaintiffs Would Harm The Company.

15. The Board reasonably believed that Plaintiffs' actions threatened an immediate sale or liquidation of Amerco.

16. The Board also reasonably feared that, even if Amerco were not immediately sold, Plaintiffs' actions might lead to a return to old management's practices and policies.

17. The Board also reasonably feared that corporate paralysis could result from the unabated continuation of Shoen family disputes.

18. In addition, the Board reasonably feared that further managerial instability would damage relations with employees, customers and lenders.

The Reality Behind The Threat to Amerco on July 24, 1988

19. The threat perceived by the Amerco Board on July 24, 1988 appeared to the Board as a very real threat. There was evidence to suggest that Dr. Sam Shoen was planning to take control of Amerco as early as April of 1987. While Dr. Sam was still an Amerco Director (February 1987-September 1987), he hired a prominent Phoenix securiites attorney and met with investment bankers to consider a leveraged buyout of Amerco. He also met with two companies that were interested in acquiring Amerco. Dr. Sam disclosed none of these activities to the other members of the Amerco Board. In early 1988, Dr. Sam shifted his focus and met repeatedly and without the knowledge of the Defendant Directors with Bear Stearns in a plan to discuss and consider the formation of a dissident shareholder group, wrest control of the Amerco Board, and promptly sell Amerco or liquidate it. On July 24, 1988, the Amerco Board perceived an imminent threat to the continuing existence of Amerco as an ongoing, profitable entity. On that same date, Dr. Sam and the dissident Plaintiff shareholders were in the final stages of formulating and implementing plans to gain control of Amerco.

III.

THE BOARD'S RESPONSE TO THE THREAT

Requests for Information.

20. During the weekend of July 23-24, 1988, various members of the Amerco Board and certain members of senior management met and considered their receipt of information regarding possible action by the dissident shareholders. Based on the available information, this group reasonably concluded that the dissident shareholders posed a potential threat to the effectiveness and policies of the corporation, including the possibility they would act in a manner not in the best interests of all the shareholders, and the group therefore requested outside counsel to advise them in connection with this matter.

Legal Advice.

21. The various directors and management of Amerco then contacted Jock Patton of Streich, Lang, Weeks & Cardon to obtain legal advice regarding an evaluation of the threat and an appropriate response. Mr. Patton is an experienced securities lawyer with special expertise in the corporate takeover area.

Consideration Of Options.

22. Mr. Patton advised the working group that shareholders representing a majority of the outstanding shares could, without notice to anyone except such holders, act through a consent resolution to take essentially any corporate act, including removal and replacement of the Board, causing a merger with a third party, or effecting a sale of assets. Such acts might not be in the best interests of all the shareholders.

23. Mr. Patton advised the wording group of a series of at least seven possible alternatives which were available to address the threat. After hearing the presentation of

counsel, the group decided to pursue three alternatives to propose to the Board. These were (a) adoption of a "super-majority" provision requiring a ⅔ vote of shareholders for any revolutionary change such as a merger or sale, (b) authorization of an additional 100,000 shares of common stock for possible use in a future transaction, and (c) issuance of previously authorized but unissued shares to certain Key Employees to ensure their dedication and loyalty and to stabilize the voting situation. The group determined not to pursue other possible alternatives recommended by Mr. Patton.

24. On the evening of July 24, a formal Board of Directors meeting was convened at which all Directors were present. Mr. Patton made a presentation with respect to each of the three proposals the working group had earlier determined would be recommended to the Board. These included the super-majority vote, creation of additional authorized shares, and the sale of previously authorized shares to a group of key employees. The Board asked counsel questions and discussed the pros and cons of each proposal. Mr. Patton also advised the Directors that their legal duty was to determine the nature of the threat being posed to corporate policy and effectiveness, to determine the imminency of that threat, and to take reasonable and proportionate steps to protect the shareholders' interests under the circumstances. As described below, the Board voted in favor of recommending the super-majority vote to shareholders and in favor of adopting the Key Employee Plan. The Board voted against the creation of newly authorized stock.

Defensive Actions.

Key Employee Stock Purchase Plan.

25. The Board of Directors adopted a Key Employee Stock Plan, which authorized the sale of 8,099 shares of Amerco stock to five key employees selected by the Board of Directors. Those key employees were Gary B. Horton,

the company's long-time treasurer; John Dodds, Executive Vice President and head of U-Haul's entire field operations; Henry Martin, head of U-Haul's insurance operations; Harry DeShong, Jr., Executive Vice President in charge of marketing; and Gary V. Klinefelter, General Counsel of U-Haul. Each of these employees purchased 1,620 shares of Amerco stock, except Mr. Klinefelter, who purchased 1,619 shares.

26. The Key Employee Stock Purchase Plan was adopted by the Board both to ensure the loyalty and dedication of Key Employees as well as to create a buffer group of shareholders for the purpose of stabilizing the situation between the dissident shareholders and management. The five Key Employees made the stock purchase with the intention of making a profit on the stock in the event Amerco was successful in the future. The Board was given a proxy to vote the shares purchased by the Key Employees.

27. The Board determined the price of the shares to be sold to the five Key Employees and they were sold for par value down with a legally binding and enforceable promissory note given for the balance.

28. The $2,715 price per share was fair and was a middle ground figure based on the appraisal by American Appraisal Associates. In addition, previous management had never paid more than $950 per share for Amerco stock other than once in the context of a settlement agreement.

29. The Key Employees could meet the scheduled interest and principal obligations on the notes by selling some shares back to the company or to an ESOP which was in the process of being established. As payments came due, the Key Employees could sell a sufficient number of shares to meet the obligations and, if the value of the shares increased, they would stand to profit.

30. The remaining actions taken by the Board of Directors on July 24, 1988 were unrelated to any takeover issues and had no anti-takeover effect that was aimed at Plaintiffs.

31. Following the Board meeting, a Shareholders' meeting took place, and the shareholders amended the Amerco Charter in accordance with the recommendations of the Board.

31. On July 25, 1988, another meeting of the Amerco Board took place. The Board determined to authorize an "Odd Lot Tender Offer" to Purchase at a price of $2,715 all shares held by holders of fewer than 100 shares. There was no anti-takeover purpose or effect of the tender offer. The Board did determine to recommend authorizing the creation of an additional 7,500 shares to fund the ESOP.

33. Several days later, on July 29, the Board adopted a Rights Plan. It was ultimately accepted by the Board after numerous presentations by counsel and the determination by the Board that it was not detrimental to shareholders but simply forced negotiaions "to come through the front door," i.e., through appropriate corporate channels.

34. On August 3, 1988, the proxy earlier granted by the Key Employees to the Board was revoked. After the super-majority provision was adopted, and after the Rights Plan was in place, there was no ability on the part of the employees alone to change control. Accordingly, they could be permitted to serve the buffer purpose which originally was envisioned and the Board therefore decided they should have the right to vote the shares.

35. The actions taken by the Board of Directors of Amerco on July 24, 25, 26, 29 and August 1, 1988, were taken in good faith, for proper corporate purposes, and were not done for the purpose of entrenching management of the company. Moreover, they were the only immediately available effective means of protecting the policies and effectiveness of the corporation.

IV.

IRREPARABLE HARM TO AMERCO FROM A RETURN TO L.S./DR. SAM SHOEN MANAGEMENT

36. Plaintiffs will not suffer irreparable harm if the preliminary injunction is denied. Amerco, however, could suffer serious, irreparable harm if the Plaintiffs' group, led by L.S. Shoen and Dr. Sam Shoen, was allowed to return to management and to implement old management policies, or if they were given the opportunity to sell Amerco either in whole or in part or to dismantle it and sell it piecemeal.

V.

BALANCE OF HARDSHIPS

37. The denial of a preliminary injunction will cause no significant hardship to Plaintiffs, to Amerco, or to any of Amerco's shareholders. The company is successful and profitable under current management and any delay occasioned by waiting for this matter to go to trial will not cause any significant hardship to Plaintiffs.

38. The issuance of a preliminary injunction, however, could cause a substantial hardship to Defendants, to Amerco, and to its employees as this would give Plaintiffs the opportunity to take control of Amerco.

39. If Plaintiffs replace current management, this could have a detrimental effect upon Amerco, its employees and shareholders.

VI.

EXTRANEOUS MATTERS RAISED BY PLAINTIFFS

Form Builders.

40. Amerco's business relationship with Form Builders is not relevant in these proceedings and should be addressed at the trial of this matter.

Dispute Over Shoen Family Estate Plans.

41. Facts relating to the Shoen Family Estate Plans, and disputes relating to the trusts and personal holding companies, are irrelevant to the present proceedings.

CONCLUSIONS OF LAW

1. If any of the above-stated findings of fact is deemed a conclusion of law, it is incorporated here as if set forth at length.

2. Plaintiffs seek by this Motion to preliminarily enjoin the effectiveness of the sale of the 8,099 shares of stock pursuant to the Key Employee Stock Purchase Plan. To obtain such relief, Plaintiffs must submit sufficient evidence to warrant a finding by the Court as to each of the following: (a) irreparable injury to the Plaintiffs will result if the injunction does not issue; (b) a balance of the hardship favors Plaintiffs; (c) public policy favors the injunction; *and*, (d) that there is a strong likelihood that Plaintiffs will succeed on the merits.

3. The Court finds that Plaintiffs have failed to satisfy their burden as to any of the four factors necessary to the granting of a preliminary injunction.

4. First, Plaintiffs have failed to establish that they or Amerco will suffer irreparable injury if injunctive relief is not granted. The Court cannot find any reason to conclude that injury would result if an injunction did not issue at this stage of the proceeding. The only result from a decision not to issue the injunction is the enfranchisement of purchasers of 8,099 shares of stock. These purchasers are all key employees whose future success and prospects are linked to the future success and prospects of the company and they have the right to vote their shares as they see fit, including aligning themselves with either side in this dispute, or on the side of any new groups which may emerge.

5. Second, the Court concludes that the balance of hardships does not favor Plaintiffs. If the Court were to grant the requested Injunction before there has been a trial and a decision on the merits, control of Amerco could immediately shift abruptly which in turn could result in financial detriment to Amerco, its employees and stockholders.

6. With regard to the third factor, the Court concludes that public policy does not favor the injunction as the Court believes that issuance of a preliminary injunction at this stage of the proceedings could be injurious to Amerco, its employees and stockholders.

7. Finally, the Court does not find a strong likelihood that Plaintiffs will succeed on the merits.

8. Based on the information available to the Board on July 24, 1988, it reasonably could be concluded that the Plaintiffs were pursuing an effort to take control of Amerco and that, if they obtained control, they posed a threat that they would act in a manner not consistent with the best interests of all shareholders and the company. Under those circumstances, the Board has not only the right, but also the obligation, to take steps to ensure that a harmful takeover did not occur.

9. Adoption of the Key Employee Stock Purchase Plan was proper in all respects, was done in good faith, and constitutes a valid exercise of the Board's business judgment. It serves to promote the loyal service of key employees of Amerco as well as serving the purpose of placing stock in the neutral hands of non-Shoen family members, which can only serve to stabilize what otherwise is a constantly shifting situation where establishment of a majority position may depend on the whim of disgruntled family members. The sale of stock to reward and provide incentives to continued employment of key employees, coupled with the ancillary effect of stabilizing the governance of a corporation by the introduction of non-

aligned, neutral shareholders, is a proper means to achieve a proper corporate goal.

10. Finally, the Court concludes that the sale of the Amerco stock to the key employees was conducted in full compliance with Nevada law. Amerco received in cash the par value of all shares of stock sold. For the balance of the purchase price, each purchaser signed a valid, binding and legally enforceable promissory note by which he agreed to pay the balance due on the contract to purchase the stock. Although the note is non-recourse, it is fully secured and the Court finds nothing unusual or improper about the use of such a secured note. Accordingly, the sale of stock complies fully with Nevada law.

Questions concerning the conduct of Form Builders business as well as disputes among Shoen family members relating to estate plans, trusts, and personal holding companies are not relevant to the issue of whether a Preliminary Injunction should issue and to the extent that these matters may be relevant at all, they should be addressed at the time there is a trial on the merits.

DATED: Feb. 6, 1989

/s/ Norman D. Ball, Jr.
NORMAN D. BALL, JR.
Judge of the
Superior Court

APPENDIX D

COURT OF APPEALS
OF ARIZONA
DIVISION 1, DEPARTMENT B

No. 1 CA-CV 89-140

SAMUEL W. SHOEN, M.D.; MARY ANNA SHOEN-EATON; CECILIA M. SHOEN HANLON; KATRINA M. SHOEN; THERESA M. SHOEN; LEONARD S. SHOEN; and the following Arizona corporations: SAMWILL, INC.; CEMAR, INC.; KATTYDID, INC.; THERMAR, INC.; and L.S.S., INC.,

Plaintiffs-Appellants,

v.

EDWARD J. SHOEN; PAUL F. SHOEN; JAMES P. SHOEN; AUBREY K. JOHNSON; WILLIAM E. CARTY; JOHN M. DODDS; GARY B. HORTON; HENRY E. MARTIN; HARRY B. DESHONG, JR.; GARY V. KLINEFELTER; AMERCO, a Nevada corporation; JIM WHITE I-X; JOHN DOES I-X; XYZ CORPORATIONS I-X; and ABC PARTNERSHIPS I-X,

Defendants-Appellees.

Sept. 18, 1990
Review Denied Feb. 20, 1991

OPINION

KLEINSCHMIDT, Judge.

This case arises out of a struggle for control of Amerco Corporation. It is an appeal from the trial court's denial

of a preliminary injunction sought by a group of Amerco shareholders to cancel the issuance of certain voting stock, to cancel acts based on the issuance of such stock, and to preclude further voting of the stock in question. We affirm the order of the trial court denying the injunction.

Amerco, a Nevada corporation, owns U-Haul Corporation, which is in the business of renting moving trucks and moving equipment. The business was founded some forty-five years ago by Leonard S. Shoen, who, over a period of time, gave his children most of his Amerco stock.

We will refer to the plaintiffs as the "dissident stockholders' group" and to the defendants as the "directors' group." The dissident stockholders' group is comprised of Leonard S. Shoen; six of his children, including Dr. Samuel W. Shoen; and seven Arizona corporations controlled by these family members. The directors' group includes three of Leonard S. Shoen's sons, including Edward J. Shoen; five stockholder-officers of Amerco; three directors of Amerco, one of whom is also a stockholder-officer; and Amerco itself. Michael Shoen is a member of the dissent stockholders' group although he is not a party to this action. Leonard Shoen's minor son, Scott Shoen, owns a beneficial interest in 1,835.94 shares of Amerco stock which is held in trust by the United States National Bank of Oregon. Scott Shoen's shares are now aligned with the dissident stockholders' group, but neither Scott nor the bank is a party to this action. Likewise, Mark Shoen and Sophia Shoen are members of the directors' group but are not parties to this action.

For reasons that will emerge, the date July 24, 1988, is significant in this case. As of that day, the dissident stockholders' group, exclusive of the 1,835.94 shares held in trust for Scott Shoen, owned a total of 45,636.48 shares of the company's stock which represented 49.66 percent of the total outstanding shares. The directors' group, again exclusive of the shares held in trust for Scott Shoen, owned a total of 42,086.73 shares representing 45.80 percent of

the total outstanding shares. Stockholders outside the family owned 2,341.85 shares which was 2.54 percent of those outstanding. Scott Shoen's interest represented 2.00 percent of the outstanding shares. In addition to the 91,901 outstanding shares, the corporation retained 8,099 treasury shares, making a total of 100,000 authorized shares.

Leadership of Amerco has shifted over the past few years, with each group representing different management styles and corporate goals. Family members have vacillated in their alliances. At the time of the events of interest here, however, the groups were aligned as set forth above. The dissident stockholders' group insists that as of July 24, 1988, the trustee for Scott Shoen was affiliated with their coalition, but this is disputed by the directors' group. We will discuss this secondary dispute in more detail below.

The events at the heart of this dispute occurred over the course of a few weeks in July 1988. On July 17, 1988, all the members of the dissident stockholders' group, except the trustee for Scott Shoen, met and signed an informal, handwritten agreement to join together to "maximize the value and liquidity of their interests in Amerco, and, if feasible at an acceptable value, to investigate a sale of Amerco at the earliest possible opportunity."

In the days following July 17, 1988, Edward J. Shoen, President of Amerco and Chairman of the Board of Directors, became increasingly concerned that the dissident stockholders' group might be planning a hostile takeover or some other action involving Amerco. His suspicion was based on bits and pieces of information about members of the dissident stockholders' group meeting with investment bankers, lawyers, and consultants known for their expertise in the areas of corporate takeover and restructuring. Several Shoen family members reported that the purpose of these meetings was to pursue a sale or breakup of Amerco. Edward J. Shoen had been told that the dissident stockholders' group had contacted an attorney who specialized in representations involving the breakup of

companies. Efforts to obtain additional explicit information from members of the dissident stockholders' group were rebuffed.

Acting on his suspicions, Edward J. Shoen organized several meetings over the weekend of July 23 and 24 with Amerco board members, in-house counsel, and outside attorneys. The meetings were held to devise a strategy to retain control of the corporation. The directors' group took several measures to ensure their control and to preserve the status quo.

First, on July 24, and prior to any formal board action, the five Shoen siblings in the directors' group entered into a written voting trust agreement which provided that for a period of thirty months, the trust members would: (1) vote their stock as a block as directed by a majority of the five members; (2) vote against any corporate sale or merger not unanimously approved; and (3) give James P. Shoen their proxies which allowed him to vote the shares of others in the group if either the number of shareholders attending a meeting was insufficient to produce a majority vote or the shareholders failed to instruct James P. Shoen how they wished the shares voted. The proxies were to be voted against any action which would result in the merger or dissolution of the company, absent unanimous consent otherwise.

The second action by the director's group was to convene a board of directors meeting on the evening of Sunday, July 24, 1988. The voting trust agreement adopted earlier that day was neither discussed at the meeting nor disclosed to the board. At the meeting, based on outside counsel's recommendation, the board adopted a Key Employee Stock Purchase Plan applicable to five senior Amerco employees. The board valued the 8,099 treasury shares held by the corporation at $2,715 per share. These shares were then committed to the plan and were sold to the five key employees. The price was based

on an appraisal by American Appraisal Associates. Each key employee was required to make a down payment in the amount of the par value of the stock of $100 per share, which amounted to $162,000 each for four of the key employees and $161,900 for the fifth. Edward J. Shoen financed the entire $809,900 down payment for these shares by writing a check from his children's conservatorship funds to each key employee. The balance of the amounts due from the key employees was evidenced by five-year non-recourse promissory notes secured by a pledge of the newly issued stock. As part of the Key Employee Stock Purchase Plan, each key employee was required to grant the board a five-year irrevocable proxy to vote the shares purchased. The board, in turn, gave Edward J. Shoen exclusive authority to vote the proxies. By mutual agreement, these proxies were, however, subsequently revoked on August 3, 1988.

The board also approved outside counsel's suggestions to issue 100,000 shares of preferred stock and to require a two-thirds "supermajority" vote to effect any significant change in the company, such as a merger or sale of substantially all assets. Additional suggestions by outside counsel were considered and rejected. These included the adoption of a "fair price" provision in the corporate charter to prevent a majority from obtaining a control premium without sharing it with the minority. If adopted, such a provision would require that if a large portion of the company were sold, the price paid for all shares must be the same. The board also rejected the suggestions that directors' terms be staggered, and that all or part of the company be sold to a "white knight" i.e., the transfer of a block of stock to a friendly company to deprive the dissident stockholders' group of the ability to take over Amerco. The board also declined to issue an additional one hundred shares of common stock for possible use in a merger or for defensive activity. The meeting then ended.

As a consequence of the activities of July 24, Edward J. Shoen was authorized to vote those shares held by the employees under the Key Employee Stock Purchase Plan and James P. Shoen was authorized to vote those shares the siblings had placed in the voting trust for a total of 50,185.73 shares, a majority of the 100,000 outstanding shares of Amerco.

After the board meeting, Edward J. Shoen and James P. Shoen held a stockholders' meeting and, pursuant to the Nevada shareholder consent procedure, adopted two amendments to the Amerco Articles of Incorporation: (1) authorizing the issuance of 100,000 shares of preferred stock, and (2) imposing a two-thirds "supermajority" requirement for significant corporate change.

On Monday, July 25, the board met again and recommended to the new majority shareholders that they authorize an additional 7,500 shares of common voting stock to bring the total shares of such stock to 107,500. These additional shares were to be available for an Employee Stock Ownership Plan unrelated to the board's efforts to consolidate its control of the eorporation. This recommendation was approved later that same day by Edward J. Shoen and James P. Shoen, by means of the voting trust and the proxies they held. A few days later, the board attached a "poison pill" to the preferred stock which had previously been authorized. Referred to as a "rights plan," it granted the holder of the preferred stock the right to buy shares in any acquiring company at half price, making an unapproved takeover economically disadvantageous to the acquiring company.

On that same Monday, July 25, wholly unaware of the directors' and stockholders' actions of July 24, the dissident stockholders' group filed a Schedule 13D with the Securities and Exchange Commission disclosing their July 17 handwritten agreement, and mailed a copy of the

schedule to Amerco.[1] The dissident stockholders' group also retained an investment banking firm to determine Amerco's stock value and to report on "alternatives for maximizing the value and liquidity of all Amerco stock."

On the same day, July 25, the dissident stockholders' group, except the trustee for Scott Shoen, executed a shareholder consent to appoint additional directors and to amend Amerco's By-Laws to protect existing shareholders' rights. The consent was forwarded to the trustee for Scott Shoen who signed it on July 27.

A few days later, still unaware of the actions taken by the directors' group, the dissident stockholders' group delivered to Amerco's secretary the signed shareholders' consent. Only then did the dissident stockholders' group discover what the board had done on July 24 and 25. Amerco's secretary rejected the consent and failed to answer repeated requests for information and details about recent stock issuance from the dissident stockholders' group. Shortly thereafter, the dissident stockholders' group commenced this litigation.

Following an extensive hearing, the trial court denied the request for a preliminary injunction. It found virtually all of the disputed facts in favor of the directors' group and concluded that the law favored their position in every respect. This appeal followed. We will discuss the trial court's findings in more detail below.

STANDARD OF REVIEW

The scope of our review of an order denying a preliminary injunction is limited to determining whether the trial court committed a clear abuse of discretion. *Financial*

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[1] Stockholders who acquire more than 5 percent of certain classes of stock in a corporation are required to file a Schedule 13D with the Securities and Exchange Commission to provide certain information regarding their acquisition of stock. 15 U.S.C.A. § 78m(d) (1981, Supp.1990).

Assocs., Inc. v. Hub Properties, Inc., 143 Ariz. 543, 545, 694 P.2d 831, 833 (App.1984); *American Credit Bureau, Inc. v. Carter*, 11 Ariz.App.145, 147, 462 P.2d 838, 840 (1969); see also *Clay v. Arizona Interscholastic Ass'n, Inc.*, 161 Ariz. 474, 476, 779 P.2d 349, 351 (1989). Unless the trial judge either made a mistake of law concerning the duties of corporate directors or clearly erred in finding the facts or applying them to the legal criteria for granting an injunction, we must affirm. *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255, 260-61 (2d Cir.1984); Rule 52(a), Arizona Rules of Civil Procedure.

The party seeking a preliminary injunction is obligated to establish four traditional equitable criteria:

1) A strong likelihood that he will succeed at trial on the merits;

2) The possibility of irreparable injury to him not remediable by damages if the requested relief is not granted;

3) A balance of hardships favors himself; and

4) Public policy favors the injunction.

Justice v. Nat'l Collegiate Athletic Ass'n, 577 F.Supp. 356, 363 (D.Ariz.1983); *Burton v. Celentano*, 134 Ariz. 594, 595, 658 P.2d 247, 248 (App.1982).

The critical element in this analysis is the relative hardship to the parties. *Justice*, 577 F.Supp. at 363. To meet this burden, the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and "the balance of hardships tip sharply" in his favor. *Id.* The type of injunction sought by the dissident stockholders' group is not a remedy favored by the courts, especially because it goes beyond simply maintaining the status quo pending a trial on the merits. See *Burton*, 134 Ariz. at 595, 658 P.2d at 248; *Klaus v. Hi-Shear Corp.*, 528 F.2d 225 (9th Cir.1975).

THE TRIAL COURT'S FINDINGS

The trial judge issued lengthy Findings of Fact and Conclusions of Law as to the four equitable criteria. Some of the evidence which he reviewed concerned the relative health of the company under the former management of the dissident stockholders' group as opposed to the company's current condition.

The trial judge found that from the information available to it, the board could reasonably have believed that the dissident stockholders' group intended to liquidate the corporation without consulting the board or the management of the corporation. He concluded that the board reasonably feared that even if the company were not sold, the dissident stockholders' group might force a return to old management practices and policies and that the board reasonably feared that unabated family disputes would lead to corporate paralysis. He also found that the board reasonably feared that further managerial instability would damage relations with employees, customers, and lenders.

The trial judge found that the price fixed for the shares of stock issued in conjunction with the Key Employee Stock Purchase Plan was a fair middleground figure. The trial judge determined that the adoption of the Key Employee Stock Purchase Plan was proper, done in good faith, and was a valid exercise of the board's business judgement. He found that the plan served to promote the loyal service of key employees and, by placing stock in the neutral hands of non-family members, stabilized a constantly shifting situation where the maintenance of a majority position depended on the whim of disgruntled family members. He concluded that the actions taken by the board were done in good faith and for proper corporate purposes, were not done for the purpose of entrenching management, and were the only immediately available effective means of protecting the corporation.

The trial judge found that the dissident stockholders' group had failed to satisfy its burden as to any of the factors necessary to the granting of a preliminary injunction. He concluded that the dissident stockholders' group would not suffer irreparable harm if the injunction were denied, but the company could suffer serious irreparable harm if the dissident stockholders' group was allowed to return to management or was given the opportunity to sell all or part of the corporation. He also found that an abrupt shift in management could result in financial detriment to the corporation, its employees, and stockholders. The trial judge believed public policy did not favor this and that the possibility that the dissident stockholders' group would succeed on the merits was not strong.

One area in which the trial court made no explicit finding of fact relates to whether, at the time the directors were taking steps to prevent the dissident stockholders' group from gaining control, the dissident stockholders' group in fact owned a majority of the outstanding shares of stock in the corporation. The dissident stockholders' group argues that if the directors of a corporation cause stock to be issued which has the effect of shifting control from a former majority of shareholders to the directors, that action is invalid as a matter of law. See *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401 (Del.1985). This argument is based on the premise that the disident stockholders' group owned a majority of the outstanding shares on July 24, 1988, the date the board voted to create the Key Employee Stock Purchase Plan and took other steps to consolidate its control.

The directors' group strenuously disputes the truth of this premise. It insists that the shares that were held in trust for Scott Shoen by the United States National Bank of Oregon were not then aligned with the dissident stockholders' group, and that without them the dissident stockholders' group was not the majority shareholder. The di-

rectors' group acknowledges that on July 27, the trustee participated with the dissident stockholders' group in signing a Written Consent of Shareholders of Amerco in Lieu of Meeting for the purpose of electing new directors. The directors' group points out, however, that when the dissident stockholders' group met on July 25 to sign the Schedule 13D, group members discussed whether they controlled a majority of the outstanding shares. While the record on this point is confusing, it appears that the dissident stockholders group did not actually believe it controlled a majority of the outstanding stock as of that date. In any event, the trust officer who ultimately signed the Written Consent of Shareholders of Amerco in Lieu of Meeting had not made up her mind to do so as of July 24. She actually signed the consent on July 27.

The dissident stockholders' group, in its reply brief, continues to assert that it had the majority of outstanding shares at the time the board took the steps to thwart a takeover, but it does not reply to the specific facts pointed to by the directors' group that support a contrary conclusion. As we have observed, the trial judge made no direct finding one way or another on this point. We do not believe the dissident stockholders' group clearly established its point on this issue. Consequently, some of the cases in which it relies do not directly support its position because the cases involve action taken to deprive majority shareholders of control.[2]

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[2] In addition to *Frantz Mfg. Co.*, 501 A.2d 401; see also *Chicago Stadium Corp. v. Scallen*, 530 F.2d 204 (8th Cir.1976); *Hatch v. Emery*, 1 Ariz.App. 142, 400 P.2d 349 (1965); *Kullgren v. Navy Gas & Supply Co.*, 110 Colo. 454, 135 P.2d 1007 (1943); *Canada Southern Oils, Ltd. v. Manabi Exploration Co.*, 96 A.2d 810 (Del. Ch.1953); *Andersen v. Albert & J.M. Anderson Mfg. Co.*, 90 N.E.2d 541 (Mass.1950).

THE LAW—DEFENSES TO CORPORATE TAKEOVERS

The dissident stockholders' group takes the position that when directors of a corporation issue new stock, they must treat all the stockholders fairly and may not issue stock to themselves or to their nominees for the purpose of gaining or retaining control of the corporation. The dissident stockholders' groups cites considerable authority for this proposition, no doubt much of it entirely valid in the context in which it was decided. In the last decade or so, however, a refinement to this rule has grown out of the rash of hostile takeover attempts which American corporations have experienced. The phenomenon, and the evolution in the law to which it has led, is well discussed in *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d at 258.

In Norlin, the director of a corporation sought to forestall a hostile takeover by, among other things, creating an employee stock option plan which concentrated greater voting power in the hands of the board. The trial court granted an injunction against the board's exercising control of the corporation in this manner because the board had failed to demonstrate that its action was fair and served the best interests of the corporation and its shareholders. The court concluded that the action was merely an attempt to entrench the existing board. The court of appeals, on the specific facts of that case, which included the fact that the board's action threatened to cause the New York Stock Exchange to delist the corporation's stock and the fact that the directors offered the shareholders no explanation for their opposition to the takeover, held that the issuance of an injunction was not error. While the appellate court in Norlin sustained the injunction, for the problem which confronts us, that case is significant for the rule of law that it adopts.

The court observed that a board member's obligation to the corporation and its shareholders involves a duty

of care and a duty of loyalty. The duty of care refers to the responsibility to exercise the care that a reasonably prudent person in a similar position would exercise under similar circumstances. The duty of care is evaluated according to the "business judgment rule," which precludes judicial inquiry into actions taken by a director in good faith and in the exercise of honest judgment in the legitimate and lawful furtherance of a corporate purpose.

The director's second duty, that of loyalty, springs from the prohibition against self-dealing that is inherent in a director's fiduciary relationship with the corporation and its shareholders. Once there is a prima facie showing that a director is personally interested in a corporate transaction, the business judgment rule does not apply, and the burden shifts to the director to show that the decision with respect to a particular transaction is fair and serves the best interests of the corporation and the shareholders.

An earlier Second Circuit decision, *Treadway Companies, Inc. v. Care Corp.*, 638 F.2d 357 (2d Cir.1980), upon which the court in Norlin relied, contained the observation:

> The cases in this area demonstrate that the courts are sensitive to the risks of self-dealing and abuse which inhere in corporate stock transactions that are intended to affect control. But at the same time courts have recognized that in certain circumstances, it is proper for management to cause the corporation to enter into such transactions. The law in this area is something less than a seamless web; some of the cases are not easily reconciled. We have concluded, however, that far from constituting an area that is beyond the purview of the business judgment rule, these cases are best reconciled by reference to the analysis typically employed under that rule.

Id. at 382.

The First Circuit has adopted the same rule expressed in lightly different terms. In *Heit v. Baird*, 567 F.2d 1157 (1st Cir.1977), a case involving the issuance of stock to impede a hostile takeover, the court said that a director may not exploit his official position to manipulate the issuance of shares solely to perpetuate his own control of the corporation. However, an issuance of stock that has the collateral effect of enhancing the power of the incumbent management is valid if the transaction has as its principal purpose some proper corporate goal. The court said that management not only has the right, but the duty, to resist attempts to win control of the corporation which, if successful, would harm the corporate enterprise. See also *Horwitz v. Southwest Forest Indus., Inc.*, 604 F.Supp. 1130 (D.Nev.1985).

As the court of appeals noted in Treadway, other courts have approached the question in a slightly different manner. For example, in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del.1985), the Supreme Court of Delaware considered whether a corporation could make a tender offer for the purchase of its own shares but exclude the corporate raider from participating in the tender offer. The court said that the rule that should govern such situations is as follows: because of the danger that a board might be acting primarily in its own interests, the courts have a duty, before applying the business judgment rule, to require the directors to show that they had reasonable grounds for believing that corporate policy and effectiveness were threatened by the takeover attempt and that the board's action was reasonable in relation to the threat posed. That burden is satisfied by a showing that the directors were not acting solely or primarily out of a desire to perpetuate themselves in control and that they undertook a reasonable investigation of the circumstances. In Unocal, the court found that board's defensive action was proper. See also *Paramount Communications, Inc.. v. Times, Inc.*, 571 A.2d

1140 (Del.1989) and 3A Fletcher Cyc. Corp. § 1041.3 (Perm.Ed.1986, 1989).

In our opinion, there is not a great deal of difference between Norlin and Unocal. Certainly in this case, the findings and conclusions of the trial court address the proper issue, however, the burden upon the directors to justify their actions is characterized. We choose to use the analysis employed in Norlin, Treadway, and Heit. Any law to the contrary, including *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del.Ch.1988), upon which the dissident stockholders' group relies, we believe to be distinguishable on the facts or we decline to adopt.

We turn then to an examination of whether the directors' actions, as found and characterized by the trial court, can survive the scrutiny of the test of fairness and of being in the best interest of the corporation and its shareholders. Our examination requires us to determine as well whether the trial judge erred in finding the facts as he did. We repeat that it is immaterial in this regard that we might have found the facts differently, as long as the trial judge did not clearly err.

The directors unquestionably had a personal interest in the transaction. While the trial court made no such express finding, any conclusion to the contrary would be untenable. So too, the trial court's finding that the board's actions were not undertaken for the purpose of entrenching management, as far as it goes, is not quite precise enough. These infirmities are not, however, fatal to the trial court's decision. The fact that the directors had a personal interest in the transaction simply triggers the inquiry as to whether their actions were fair and in the best interests of the corporation and its shareholders. As to entrenching themselves, that was the potential collateral result of the board's actions in every case upon which we rely. The important point is that even if the action entrenches the board, it is permissible if it also serves a proper corporate purpose. See *Heit*, 567 F.2d at 1161.

The idea that entrenchment was not the sole reason for the board's action in this case is inherent in the trial court's findings. The conclusions that the board's actions were fair, were undertaken for the best interests of the corporation and the shareholders, and were reasonable in view of the threat posed are either expressly made by the trial judge or inhere in his findings. While the dissident stockholders' group insist that it was not bent on a hostile takeover and vigorously attacks the trial judge's conclusions, we cannot say that the trial judge clearly erred in finding the facts as he did. While the trial court did not articulate its conclusions of law in terms of the decisions which we believe control this question, its findings support its decision under what we believe is the governing law.

FAILURE TO DISLOSE THE VOTING TRUST AGREEMENT TO THE BOARD

The dissident stockholders' group argues that the failure to disclose to the board that five Shoen siblings had entered into a voting trust agreement deprived the board of information that it needed to make an intelligent decision about the other defensive measures the board was contemplating, and thus invalidated the board's action of July 24.

The dissident stockholders' group, in its opening brief, alludes to the voting trust agreement in detail and attaches a copy of it as Appendix C to the brief. The directors' group states that the agreement is not part of the record. In its reply brief, the dissident stockholders' group discusses the details of the voting trust agreement without answering the assertion that it is not part of the record. The trial judge did not refer to the voting trust agreement in his Findings of Fact and Conclusions of Law. It is, however, implicit in his finding that the Key Employee Stock Purchase Plan was properly adopted that nothing about the voting trust agreement should invalidate the board's actions of July 24.

We believe that the voting trust agreement is properly before us. It is found in the appendix to the opening brief immediately following the Schedule 13D which the director's group filed with the Securities and Exchange Commission on August 3, 1988. The voting trust agreement is extensively described in the Schedule 13D, and that document recites that the voting trust agreement is attached to it as an exhibit. The Schedule 13D is exhibit 13, received into evidence on December 13, 1988, and is also exhibit 204 to the deposition of Paul Shoen of August 22, 1988, which was filed with the trial court and is part of the record.

The gist of the dissident stockholders' group's argument is that the voting trust agreement gives each party to it an absolute veto over any proposal to merge or sell Amerco until January 1, 1991, the date the agreement is due to expire. This, the group says, in conjunction with the adoption of the Key Employee Stock Purchase Plan, which assured that the directors' group controlled a majority of the outstanding shares, gave the five siblings who signed the voting trust agreement the power to "control Amerco absolutely, with no corporate action of consequence possible without the unanimous approval of them all."

The dissident stockholders' group cites the testimony of several members of the board who had not been advised of the existence of the voting trust when they voted for the adoption of the Key Employee Stock Purchase Plan. The dissident stockholders' group argues that the information about the voting trust was material to the board's decision. One board member, John M. Dodds, testified that on July 24 he knew nothing of the voting trust agreement. When asked whether it would be appropriate to give a 10 percent shareholder a veto over a transaction involving the sales of the company, he said that would be wrong.[3]

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[3] Edward J. Shoen owned 10 percent of Amerco's shares.

Another director, Aubrey K. Johnson, was also unaware of the voting trust agreement. He said that as a director he would not give a veto power over the sale of the corporation to one shareholder. When asked if it would have been important to him to have known of the voting trust agreement, he said that based on his knowledge of the individuals concerned, it was his personal opinion that the agreement would never be enforced. He said that had he known of the agreement it would have had no significance to him in terms of the action he participated in on July 24 in recommending the requirement for a two- thirds majority of shareholders to approve a significant corporate change.

The dissident stockholders' group cites a single case, *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del.1988), in support of its argument on this point. In that case, the Supreme Court of Delaware considered the effect of a failure of several members of corporate management to advise the board of their personal financial interest in a corporate restructuring and of their having advised one potential purchaser of another's bid. The court concluded that this misconduct, which was extensive, irremediably tainted the design and execution of the whole restructuring transaction.

The directors' group takes the position that the information about the voting trust agreement was not material to the board's actions of July 24. It points out that its opponents have cited no Nevada or Delaware authority to the effect that directors have a duty to inform the board of their participation in such an agreement. The directors' group concedes that there would have been a duty to tell the board of the agreement if some director had a personal financial stake in a specific transaction that would be influenced by the board's action.

The chief argument which the directors' group makes on this point, however, is that the Key Employee Stock Pur-

chase Plan and the voting trust agreement did not have the effect that the dissident stockholders' group says they did. The directors' group points out that the proxy given to Edward J. Shoen under the Key Employee Stock Purchase Plan would remain in effect "unless otherwise determined by board action." This being true, it says, if Edward J. Shoen tried to block action that the majority of the board favored, all the board had to do was remove his power to vote the 8,099 shares that had been issued pursuant to the Key Employee Stock Purchase Plan.

The dissident stockholders' comeback is that as far as the directors knew when they voted on the measures adopted on July 24, Edward J. Shoen owned only 10 percent of the outstanding shares of Amerco when in fact, by virtue of the voting trust, he had a proxy to vote 45.80 percent of the stock.[4] Had the board known this, the dissident stockholders' group suggests, it would not have acted as it did.

The dissident stockholders' group, on these briefs and this record, fails to convince us that the preliminary injuction should have been granted because the voting trust agreement was not disclosed to the board. While we would not go so far as to say that the information was immaterial, the undisclosed information was not nearly as important to the board's decision as the information that was withheld in Mills. In the case before us, the directors could hardly have been ignorant of the nature of Edward J. Shoen's interest in maintaining control, even if they were not aware of the precise extent to which he had formalized that control. Further, in view of the fact that the board could withdraw the proxy given to Shoen under the Key Employee Stock Purchase Agreement, the dis-

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[4] We assume that this is an oversight on the part of the dissident stockholders' group. The voting trust agreement gives the proxies to vote the stock to James P. Shoen. The evidence reflects that James P. Shoen exercised those proxies when stockholder votes were taken.

sident stockholders' group exaggerates the extent of that control. We note that no uninformed member of the board has sought to repudiate the board's actions of July 24, and we are unadvised as to the law as it might relate to a ratification of such actions once the members of the board become aware of the voting trust. Under these circumstances, it would not be advisable for us to try and define the law of the case on this issue. Since this litigation will continue, the parties may wish to pursue and develop this issue further, both as to the facts and as to the applicable law.

ADEQUACY OF THE CONSIDERATION FOR THE KEY EMPLOYEE STOCK PURCHASE PLAN

The dissident stockholders' group argues that since the key employees to whom the 8,099 shares were issued paid for those shares with non-recourse promissory notes, the issuance of the shares was void because it was both a sham and fraud and a violation of Nevada statutes.

Under the terms of the stock purchase agreement, each of the five key employees paid cash equal to the $100 per share par value of the stock. The balance due for the stock was financed by non-recourse promissory notes. The plan provides that the payee's sole remedy for default is the recovery of the stock for which the note was issued and that the employee has no personal liability for payment. If any key employee fails to pay, the company can declare the note immediately due and payable and may redeem the stock issued by refunding what the employee paid for it.

The dissident stockholders' group argues that all of the circumstances attending the sale of the shares to the key employees, and the board's failure to investigate the ability of the key employees to pay these notes, which it suggests that none of them will ever be able to do, renders the transaction a sham and a fraud.

The directors' group counters with the argument that the trial judge found that a legally enforceable obligation does exist. It points out that there was testimony before the trial judge from a corporate attorney that the use of non-recourse notes is common in stock transactions, particularly where the purpose is to give an employee who purchases stock the benefit of a rising stock price without the burden of bankruptcy if the value of the stock fails to rise or decreases.

The directors' group also argues that the employees to whom the stock was issued promised to use their best efforts and that such a promise is not illusory, citing Calamari, The Law of Contracts §§ 14-18 (1987). It adds that since the purpose of the stock purchase plan is to generate loyalty and commitment from valued employees, the resulting benefit to Amerco is classic contractual consideration.

It also points out that each employee paid Amerco in excess of $160,000 as a down payment and that the employee could not recoup the interest on that amount were he to fail to pay for his stock and allow the corporation to receem it. This time-value of the down payment, it argues, benefits the corporation and is a detriment to the key employees. The directors' group also points out that the key employees received no security in return for the par value down payment. As a consequence, they have incurred the risk that as to that amount, nothing protects them against the general creditors of the corporation in the event the corporation cannot meet its obligations.

We conclude that the order of the trial court denying the request for a preliminary injunction ought not be reversed on the grounds that the sale of stock to the key employees was a sham or a fraud. The trial judge found that all of the key employees to whom stock was sold could meet the scheduled interest and principal obligations on the notes by selling some of their shares back to the corporation or to an Employee Stock Option Plan

that was being established. He also found that the reason for the sale of the stock was to secure the continued services of the key employees. As we have already concluded, it was not an abuse of discreton to find that such was, indeed, one of the reasons for adopting the plan.

Further, the various benefits and detriments conferred and incurred, mentioned above in our discussion of the arguments advanced by the directors' group, constitute consideration for the issuance of the stock to the key employees. Our decision is bolstered by the expert witness who testified that it was common to finance sales of stock to corporate employees with non-recourse notes. While this testimony was of a very general nature and was not specifically related to Nevada practice, it was uncontradicted. We cannot agree with the dissident stockholders' group on this record that the plan was unquestionably a sham and a fraud.

The more difficult question is whether this transaction violates Nevada statutes, and if so, the consequences of that violation. Nevada Revised Statutes section 78.210 provides inter alia:

> A corporation . . . may issue stock for cash, labor, services or personal property, or real estate of or leases thereof. Any shares issued for such consideration shall be deemed fully paid if:
>
> 1. The entire amount; or
>
> 2. Not less than the amount characterized by capital pursuant to NRS 78.270 accompanied by the legally enforceble obligation of the subscriber to pay the balance of the subscription, has been received by the corporation.

Section 78.200 provides, inter alia, that if there be a subscription default,

> the corporation may proceed to collect the amount due in the same manner as any debt due the cor-

> poration. . . . No penalty . . . may be declared . . . unless the amount due remains unpaid for 30 days after written demand.

Section 78.225 provides, inter alia:

> Where a . . . subscription . . . has been made, . . . a holder of shares of stock not fully paid shall be personally liable . . . not in excess of the amount unpaid. . . .

The dissident stockholders' group argues that these sales violate these provisions because the non-recourse notes are not "legally enforceable obligations to pay" within the meaning of section 78.210. It says that Amerco and its creditors have no legally enforceable right to hold the key employees to their obligation because the employees can simply decline to pay the balance on the notes and give back the stock. It contends that section 78.210 and section 78.225 of the Nevada statutes read together require that a subscriber to stock who has not paid cash for the full value of the stock must be personally liable for the unpaid balance or the issuance is void.

The capital stock of a corporation and the unpaid subscriptions for that stock constitute a trust fund for the benefit of the general creditors of the corporation, and where the law requires a public declaration of the amount of capital upon which the corporation operates, the general public has a right to rely on the truthfulness of such declaration. See *Thompson v. Reno Savings Bank,* 19 Nev. 103, 7 P. 68 (1885).

The directors' group insists that the stock issued to the key employees in this case is fully paid for within the meaning of section 78.210 because cash was paid for the par value of the stock and a legally enforceable obligation to pay was given for the balance of its value. We agree that the notes are enforceable contracts in the sense that if they are not paid, consequences will ensue for the key employees. They will lose their stock and

receive back the amount of money they have paid for it. If the stock was realistically valued in the first place and has held that value, or if the stock has risen in value, the corporation may enjoy a benefit, and the makers of the notes may suffer a detriment if the payments on the notes are not met. Certainly, if the stock has risen in value, it would be in the employee's interest to dispose of enough of the stock to allow them to maintain their payments on the rest. If the stock has fallen in value, however, the remedy available to the corporation has little value either to it or its creditors.

The Nevada statutes require not only that the subscription constitute a legally enforceable obligation, but also that the subscriber must bear personal liability for that obligation. The dissident stockholders' group cites not a single case, from Nevada or elsewhere, which holds that a non-recourse provision in a subscription agreement voids the entire agreement and the corporate act of issuing the stock based on the agreement. Instead, it cites several cases for the proposition that an injunction is appropriate to prevent the issuance of stock in a manner which conflicts with a statute, regardless of the extent of the harm threatened. We analyze those cases briefly.

In *Bank of New York Co. v. Irving Bank Corp.*, 139 Misc.2d 665, 528 N.Y.S.2d 482 (1988), the directors of a corporation attempted to defend against a hostile takeover by adopting a poison pill in the form of a "rights plan" that would limit the powers of any board elected as the result of an unapproved takeover. The court enjoined the execution of this scheme because it violated a statute that required restrictions on the powers of the board to be included in the certificate of incorporation.

Allen v. Prime Computer, Inc., 540 A.2d 417 (Del. 1988), dealt with a bylaw adopted by a target corporation to delay for twenty days the effectiveness of certain actions taken by shareholder consent. The court enjoined

the enforcement of the bylaw because by statute the right of shareholders to act immediately by consent could only be modified or eliminated by a proviso contained in the certificate of incorporation.

In *Studebaker Corp. v. Gittlin*, 360 F.2d 692 (2d Cir. 1966), the court enjoined the use of proxies obtained in violation of the Securities Exchange Act of 1934.

Finally, in *Schwab v. Potter Co.*, 194 N.Y. 409, 87 N.E. 670 (1909), the court held that an attempt by one corporation to create a new corporation in which the first corporation would be the sole shareholder was void as beyond the statutory powers of corporations and could therefore be enjoined.

The cases cited do not deal with the issuance of stock. They only support the limited proposition that when directors of a corporation are acting to consolidate their control, their conduct is subject to injunction if they act contrary to their authority. These cases also address situations in which an injunction appears to have been the only effective remedy the courts could provide. That is not necessarily the case here. First, there is nothing in the Nevada statutes which says that all stock issued must be paid for in full. The very existence of section 78.225 suggests the contrary. It recognizes that not all stock will be paid for in full and prescribes how a subscriber shall be treated should his unpaid balance be needed. Second, the conflict here is between the provisions of the agreement allowing for a non-recourse note and specifying that the corporation may recover the stock upon refund of the amount paid for it on the one hand, and the Nevada statute which declares that subscribers who do not fully pay for their stock are liable to the extent of the unpaid balance on the other. That portion of the agreement which conflicts with the statute may be void. In other words, it may be that in spite of the agreement between the corporation and the key employees that the obligation be non-recourse, the key employees are by virtue of

the statute personally liable to the full extent of the unpaid balance of the notes. We understand the directors' group to say as much in its brief, although it is less than clear in doing so. As the directors' group puts it, the statute "requires the imposition of personal liability for the balance of the stick price only when a debtor [sic] sues the corporation and attempts to hold its stockholders individually liable when they have not 'fully paid' for their stock." It then proceeds to assert that there is no law to the effect that an issue of stock is invalid if it is not fully paid.

The dissident stockholders' group has not replied directly to the directors' group's suggestion that the effect of the conflict between the subscription agreement and the statute is not to render the issuance of the stock void, but to render the subscribers personally liable. The dissident stockholders' group cites no authority other than the statute itself. The dissident stockholders' group did not carry its burden, either below or in this court, of showing that the Nevada statute has the consequences for which it contends. We conclude, without purporting to establish the law of the case on this particular point, that the dissident stockholders' group has not established its right to a preliminary injunction because of the way in which the employees agreed to pay for the stock. The parties are entitled to develop this issue further at trial.

SUMMARY

We adopt the rule of *Norlin Corp. v. Rooney, Pace Inc.* concerning the law as to directors' responsibilities in the face of a hostile takeover attempt. We conclude that the failure of the directors to disclose the voting trust agreement and the possible conflict between the Key Employee Stock Purchase Plan and the Nevada statutes does not mandate the issuance of a preliminary injunction. We do not purport to define the law of the case on the two latter points.

The order of the trial court denying the issuance of a preliminary injunction is affirmed.

JACOBSON, P.J., and LANKFORD, J., concur.

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

No. CV 88-20139

LEONARD S. SHOEN, *et al.*,
Plaintiffs,

vs.

EDWARD J. SHOEN and PAUL J. SHOEN, *et al.*,
Defendants.

Phoenix, Arizona
September 20, 1994

BEFORE THE HONORABLE THOMAS DUNEVANT, III

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Morning Session)

PROCEEDINGS

[4] THE COURT: The Court has had the director defendant's motion for directed verdict under advisement.

The director defendants have, have moved for a directed verdict on, on several grounds as follows:

That the plaintiffs have failed to present by clear and convincing evidence, evidence sufficient to, to warrant this matter going to a jury on the plaintiff's punitive damages claim, that the plaintifls have failed, as a matter of law to mitigate their damages by failing to explore or accept outstanding offers of liquidity for their stock, that the plaintiffs have failed as a matter of law to prove that the alleged entrenchment actions of director defendants proximately caused damages, that the plaintiffs have failed to plead special damages for their breach of contract claim and that the plaintiffs have failed as a matter of law to prove actual and ascertainable damages.

The Court finds as for the plaintiffs's breach of contract claim, the plaintiffs have conceded on the record yesterday that they are not making a request for punitive damages, so the issue is moot. Even if it [5] was not moot, as a matter of law the plaintiffs would not be entitled to an award of punitive damages on the contract claim.

With respect to the bases set forth in the director defendant's motions, bases numbered two through five appear on page, appear on page 2, the Court finds that reasonable minds could differ.

More specifically, those bases again are that the plaintiffs have failed as a matter of law to mitigate their damages by failing to explore, accept outstanding offers of liquidity for their stock. Plaintiffs have failed as a matter of law to prove that the alleged entrenchment actions of the director defendants proximately caused damages. Plaintiffs have failed to plead special damages for the breach of contract claim, and plaintiffs have failed as matter of law to prove actual and ascertainable damages.

There are a plethora of disputed facts in the record at this point. From those, from those disputed facts, there are many inferences that the trier of fact could draw, which is another way of saying, based upon the facts as

they are presented now, reasonable minds could differ on the facts alone. Based upon the inferences that could be drawn from those facts, reasonable minds could differ with respect to bases two [6] through five enumerated in the director defendants motion.

The determination of the facts and inferences to be drawn from those facts is a matter for the jury in this trial. For example, issues and/or arguments relating to perceived weaknesses and the methodology of L.S. Shoen's damage testimony and, and the manner and method in which the individual plaintiffs have, have valued their stock go to the weight at this point, and the jury has to decide what, if any, weight to give to, to that testimony.

I don't intend to, to list all these areas, I am just giving some examples.

Issues and/or arguments relating to whether or not the plaintiffs have reasonably made attempts to mitigate their damages, again, is a jury question.

One of the issues perhaps the jury will have to address is one of pure credibility. When the plaintiffs say they don't trust the director defendants, is there sufficient evidence in this record to persuade the jury that there is a good reason for the lack of trust. Depending on how that is answered, the jury will, will determine the facts a certain way.

There are a lot of those sorts of things that are in this record, and it would be clear error to, [7] to grant a motion for directed verdict.

Moving to Basis No. 2—excuse me, I should say Basis No. 1, which is the, which is the plaintiffs have failed to present clear and convincing evidence to submit to a jury on the claim for punitive damages. As to all of the director defendants, except for Joe Shoen, the motion is granted.

The Court notes as a preliminary matter that the burden of proof is clear and convincing evidence, which is a rigorous standard. It is a much higher standard than a mere preponderance of the evidence.

The plaintiffs in this case must prove under Nevada law, and the statute is NRV 42-005, that's the governing statute. The plaintiffs must prove by clear and convincing evidence that, that each individual director defendant is guilty of fraud, oppression, or malice, in fact, to justify punitive damages.

The Court emphasizes the words "in fact" because under the Craigo versus Circus-Circus, 786 P.2d 22, the Court goes to great lengths to indicate that, that the statute requires proof of malice in fact, not malice in law or implied malice.

For example, in California and in Arizona at least there is the argument that can be made that if there is a finding of conscious disregard of the rights [8] of the plaintiffs which results in injury, I am paraphrasing some of the language, that could be a ground for a punitive damage award. That's implied in law, malice.

Nevada has not adopted that standard. It has to be proved specifically in the facts, which is another way of saying that the required mental state, culpable mental state that has to be proved as to each individual defendant is that there was, there was this ill will, this spite, this motive, this motivation, in fact, to injure each and every plaintiff in this action.

As to all of the director defendants, except for Joe Shoen, there is little or no evidence to support those allegations. Even if there is some evidence, it doesn't come close to approaching the clear and convincing standard, which is a different way of saying, reasonable minds could not differ, that there is not ample evidence in the record to establish malice in fact.

As a matter of law the Court has to look at each individual director defendant rather than the director defendants as a board. When you consider the record as to each individual defendant, the Court cannot identify a sufficient quantum of evidence that would support this matter going to the jury.

The Court also notes that, that independent [9] legal counsel was involved in, in several aspects of the transactions that are the subject of the litigation, and that is an important factor under the law that, that can be considered and should be considered, and certainly should be considered in this case, especially with respect to all of the director defendants, except for Joe Shoen. The legal advice alone is probably enough to negate any allegation of malice aforethought on the part of the director defendants.

As I referred to them, when I say director defendants at this point, I am referring to everybody, except for Joe Shoen.

With respect to whether or not the director defendants, now I am referring to all of the director defendants, reasonably concluded that they faced a control battle, that's a disputed issue. That's a jury question, but that goes to, to the allegations of breaches of fiduciary duty. That is not the something more in fact that is required under the Nevada law to establish punitive damages.

The language in the Craigo opinion is especially important because Nevada law applies, and as I said, Nevada law is, is slightly different, at least as the Court interprets it, from Arizona law on this issue of punitive damages. [10] On page 2, excuse me, page 24 of the Craigo case, the Court highlights certain language from various appellate cases from that jurisdiction.

For example, in Warmbrodt, W-a-r-m-b-r-o-d-t, versus Blanchard, 100 Nevada 703, the Court says, "The term 'malice' as used in the statute means malice in fact and

denotes ill-will or desire to do harm for the mere satisfaction of doing it."

Citing Bader, B-a-d-e-r, 96 Nevada, page, page 359, the Court says, "The term 'malice' as used in the statute means malice in fact and denotes ill-will or desire to do harm for the mere satisfaction of doing it."

Citing to Kelly Broadcasting v. Sovereign Broadcast, 96 Nevada 188, the Court says, "In order to award punitive damages, the trial court must find substantial evidence of malice in fact."

On page 25 of the opinion, in discussing the Davis decision, the Court goes on to say, "Where the term 'malice' includes not only a malicious intention to injure the specific person harmed, but conduct evincing a conscious disregard of the probability that the actor's conduct will result in injury"—let me go back and read the entire thing so it will make sense.

"Davis has yielded to subsequent decisional law that has advanced the common law pertaining to [11] punitive damages to the point where the term 'malice' includes not only a malicious intention to injure the specific person harmed," which is malice in fact, "but conduct evincing a conscious disregard of the probability that the actor's conduct will result in injury to others," which is malice in law, or malice implied.

The Court later goes on to say, "In Nevada, while consistently reaffirming the vitality of the Davis doctrine in our decisional law, this Court has, on occasion, also affirmed punitive awards based upon malice of a nature foreign to our own rulings on the subject."

It finally goes on to say, at least the portions that I want to read, "The species of malice known as implied malice or malice in law is distinguished from malice in fact simply by absence of the need to look to the actor's motivation and purpose."

"The common law evolves by recognition of firmly entrenched social attitudes and practices. The common law does not shape or establish public policy and mores," which is another way of saying public policy or morality, "rather, it is reflective of them. It remains consistent with public policy as expressed by NRS 42.010 to financially punish persons who deliberately injure others."

"More specifically, it is this Court's [12] intention to restrict awards of punitive damages attributable to malice in fact to those extreme cases that convincingly demonstrate conduct motivated by hatred and ill-will and the deliberate intent to injure. Difficulties arise when the judicial gaze is not transfixed on the indispensable element of malice in fact, i.e., the evil motive. A defendant's conduct may have an evil or injurious result, but no underlying evil motive to injure."

I will add parenthetically, at best, as the record currently stands as to all of the director defendants, except for Joe Shoen, the record may bear out that there was injury or an injurious result to the plaintiffs caused by those particular director defendants, but that alone under Nevada law is not enough. That's a jury question, which is a different way of saying, if there was injury caused, that's a matter of compensatory damage and not a matter of punitive damage.

"It is"—I am going back to the opinion, "It is the evil motive to injure that must be shown directly or by inference as a predicate for a punitive award based upon malice. If the judicial course remains tethered to that compass, punitive verdicts should be limited to those actions that truly warrant state-imposed sanctions. Persons who willfully intend to injure are [13] deserving of the special monetary sanction that is designed to punish and deter. Others who by their conduct cause injury are held accountable in the form of compensatory damages."

As to the last sentence I just read, that applies, at best, based upon the disputed facts as they are presented in the record as to, as to all of the director defendants, except for Joe Shoen, more specifically, Edward J. Shoen, Aubrey K. Johnson, William E. Carty, John M. Dodds and Paul F. Shoen.

Therefore the Court, incorporating the entire record and, and having highlighted some of the grounds for its ruling, it is ordered granting director defendant's motion on the plaintiff's punitive damage claims as against Edward J. Shoen, Aubrey K. Johnson, William E. Carty, John M. Dodds and Paul F. Shoen.

With respect to Joe Shoen, there is adequate evidence in the record from which a jury could find by clear and convincing evidence that the actions undertaken by him were intentional acts, were willful acts, were spiteful acts, and were designed to injure the individual plaintiffs.

I am not going to highlight all of them, but I will certainly highlight at least two—well, three from which—
[14] MR. SHAW. Your Honor, I believe you misspoke several times on the record. Just to correct, I believe you keep referring to Edward Joe Shoen as being one of the defendants you are excepting from your ruling and then say Joe Shoen as part of the, of the, of the—

THE COURT: I correct myself.

MR. SHAW: Excuse me.

THE COURT: That's confusing. I meant to say James P. Shoen is incorporated in the ruling. Joe Shoen, Edward Joe Shoen is not. Thank you.

With respect to Joe Shoen, there is in the record a history of strong feelings, negative feelings as and between his father, L.S. Shoen, as and between Samuel Shoen, at the very least.

There is also a letter that was written by Joe Shoen in which, in which the letter that I am referring to is the

letter where, where he indicates that L.S. Shoen has made his decision with respect to his heir apparent. I won't repeat some of the other things in the letter, but that letter alone may be enough from which a jury would feel that, that the actions taken by Joe Shoen fall within the category of malice in fact. It is a jury question.

There is also the correspondence witten by Joe Shoen surrounding the circumstances where his [15] children were apparently being served, and he was very upset about that.

Now, there is a dispute as to what was going on and why he made the statements that he made, and in fact—well, that's a matter for the jury to resolve, but those statements are, are part of the record, and that alone could be enough from which a jury might feel that his actions, in particular, are motivated with an intent to injure.

In addition to that, there is his conduct, both his conduct in speech and his conduct with respect to Samuel Shoen, and also his conduct in speech with respect to L.S. Shoen, that would suggest that there is enough for a jury to decide whether or not he is motivated by spite and ill will.

Those are jury questions. Those are not questions that this Court can sit here and resolve because there are too many questions this Court would have to ask and too many factual disputes that this Court would have to draw, have to decide, and too many different inferences from the facts that would, that could be drawn. For this Court to get involved in that exercise would be a way of saying that the Court does not believe that it should follow the Craigo, and that unless you can conclude as a matter of law, as a matter of law [16] that it is not a jury question, it goes to the jury.

Now, I just highlighted a few. There are more than that, and I don't intend to highlight them all. I stand

on the record, but the record is markedly different with respect to Edward Joseph Shoen, as compared to or contrasted with the remaining director defendants.

Therefore, with respect to Edward Joseph Shoen, the director defendants for, the director defendant's motion for directed verdict on, on the plaintiff's punitive damages claim is denied.

MR. SHAW: Your Honor, this gives rise to an issue that the defendants raised at the beginning of their case which we haven't really discussed, and that is the issue under Nevada law, they have a bifurcated trial.

We have done some research on it, and we believe that, that it is a procedural versus substantive issue and we should go ahead and proceed under Arizona procedural law to, to combine the entire matter versus the Nevada case, doing it after the fact.

* * * *

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543-0001

June 3, 1998

Mr. John G. Roberts
Hogan & Hartson
555 Thirteenth Street, N.W.
Washington, DC 20004-1109

Re: Edward J. Shoen
v. Samuel W. Shoen, et al.
Application No. A-917

Dear Mr. Roberts:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on June 3, 1998, extended the time to and including July 15, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER
Clerk

By /s/ Sandra Elliott Spagnolo
SANDRA ELLIOTT SPAGNOLO
Assistant Clerk